85-574

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAURICE THOELE, LOUIS ARADO, HUGH HERATY, GARVIN NIX, JOSEPH LORENZ, MICHAEL GRIEGEL, WILLIAM McCORRY, DENNIS JYRKOWSKI, JOSEPH MUCIA, ROBERT MURRAY, JAMES ORR, RICHARD KIMBLE, JOHN KACHKA, ALEX McCRAE, FRANK SADLER, THOMAS MINASOLA, GEORGE HEAD, LEONARD MIJKA, JOHN VOLLAND, RONALD JABLON, RICHARD RICCIO, ARTHUR BISCHOFF, JAMES GEOGHEGAN, JOHN DUFFY, DANIEL McCRORY, WILLIAM DEVONEY, ROY WALKER, ALBERT POHL, ROBERT KEATING, RUSSELL ALONGI, KENNETH BRINGE, JOHN CULLOTON, JOHN TOLLEY, JOHN J. MURPHY, HUGH O'MALLEY, CARL NEUMULLER, JAMES BEGLEY, JAMES MORGAN, WILLIAM O'BRIEN, RAYMOND GREENWOOD, THOMAS CRONIN, THOMAS BRADY, TERRENCE McCUE, ROBERT TILL, FRANKLIN CRAWFORD, RAYMOND GIEHOOB, DANIEL MORAN, PATRICK LOGAN, TERRENCE FORBES, RALPH MORETH, JAMES P. BROWN, PAUL C. CEFFALIO and CHARLES R. LOFTUS, individually and on behalf of all others similarly situated,

Petitioners,

v.

CITY OF CHICAGO, CHICAGO POLICE DEPARTMENT, RICHARD J. BRZECZEK and CHARLES H. POUNIAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether civil service employees have a protected property or liberty interest in the procedures used to determine promotions which are required by law to be based on merit.

LIST OF PARTIES

In addition to the parties contained in the caption of the case in this Court, plaintiffs below included the following:

WILLIAM C. BIGBY, JR., CURTIS B. BONDS, MAURICE BROWN, ALBERT COX, JR., JAMES W. CRAIG, HOSEN CROSSLEY, DANIEL A. GIBSON, NOLON B. HAWKINS, ALBERT C. HENRY, CECIL B. HOCKETT, HUBERT M. HOLTON, EUREL JACKSON, ELMER LEWIS, ROOSEVELT LOWE, THURSTON MCCLENDON, JR., EARL J. MCGHEE, SR., LEROY O'SHIELD, ERNEST SILER, WILLIAM SHAW, JR., WILLIAM THOMPSON, LAMORNE C. THREET, WILLIE WILLIAMS and JULIUS A. YOUNG.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners MAURICE THOELE, LOUIS ARADO, HUGH HERATY, GARVIN NIX, JOSEPH LORENZ, MICHAEL GRIEGEL, WILLIAM MCCORRY, DENNIS JYRKOWSKI, JOSEPH MUCIA, ROBERT MURRAY, JAMES ORR, RICHARD KIMBLE, JOHN KACHKA, ALEX MCCRAE, FRANK SADLER, THOMAS MINASOLA, GEORGE HEAD, LEONARD MIJKA, JOHN VOLLAND, RONALD JABLON, RICHARD RICCIO, ARTHUR BISCHOFF, JAMES GEOGHEGAN, JOHN DUFFY, DANIEL MCCRORY, WILLIAM DEVONEY, ROY WALKER, ALBERT POHL, ROBERT KEATING, RUSSELL ALONGI, KENNETH BRINGE, JOHN CULLOTON, JOHN TOLLEY, JOHN J. MURPHY, HUGH O'MALLEY, CARL NEUMULLER, JAMES BEGLEY, JAMES MORGAN, WILLIAM O'BRIEN, RAYMOND GREENWOOD, THOMAS CRONIN, THOMAS BRADY, TERRENCE MCCUE, ROBERT TILL, FRANKLIN CRAWFORD, RAYMOND GIEHOOB, DANIEL MORAN, PATRICK LOGAN, TERRENCE

FORBES, RALPH MORETH, JAMES P. BROWN, PAUL C. CERFALIO and CHARLES R. LOFTUS, both individually and on behalf of all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 1, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in the Appendix. The opinion of the United States Court of Appeals for the Seventh Circuit in *DiIulio v. Board of Fire and Police Commissioners*, 682 F.2d 666 (1982), which was overruled by the opinion below, is set forth in the Appendix. The opinion of the United States District Court for the Northern District of Illinois in this case is set forth in the Appendix.

JURISDICTION

The Court of Appeals entered judgment on July 1, 1985. Appendix at A-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Due Process clause of the Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . .

U.S. Const. Amend. XIV, §1.

Section 10-1-13 of the Illinois Municipal Code provides, in relevant part:

> The [civil service] commission shall, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion.

Ill. Rev. Stat. ch. 24, §10-1-13 (1983).

Section 25.1-1 of the Municipal Code of the City of Chicago provided, until 1981:

> It is the general purpose of this ordinance and it is necessary in the public interest, to establish a system of personnel administration that meets the social, economic, and program needs of the people of the City of Chicago, to provide for a professional and progressive merit system for employment and to insure flexible career service within the City of Chicago by substituting a public employment system superseding the Civil Service System now operating within the City of Chicago pursuant to the law of the State of Illinois.

The Section currently provides:

> It is the general purpose of this ordinance and it is necessary in the public interest to establish a system of personnel administration that meets the social, economic, and program needs for the people of the City of Chicago, to provide for a professional and progressive merit system for employment and to insure flexible career service within the City of Chicago.

Chicago, Ill., Mun. Code, §25.1-1 (1977); *Id.*, §25.1-1 (1982).

The Personnel Code of the City of Chicago provides, in pertinent part:

> All examinations shall relate to those matters which will test fairly the capacity and fitness of the applicant to perform efficiently the duties of the position.

Chicago, Ill., Personnel Code, Rule VI, §2 (1981).

STATEMENT OF THE CASE

STATEMENT OF FACTS

After federal court decisions invalidating a number of employment practices of the Chicago Police Department, the Department, the City of Chicago and the Department of Personnel of the City of Chicago, defendants-appellees below and respondents herein, began the preparation of an examination for the promotion of sergeants to lieutenant. Preparation was initiated in September, 1974 and completed in 1977. The examination was intended to ascertain and measure relative merit and abilities among applicants for lieutenancies.

The preparatory tasks undertaken centered around a "task analysis" meant to identify relevant job functions and skills for lieutenants. Interviews were conducted with 30-40 field lieutenants during which a questionnaire was answered, and a second questionnaire was subsequently submitted to 20 additional lieutenants. Based upon the questionnaire results defendants determined that a written test followed by a "job assessment" center would be the appropriate means by which to measure relevant abilities for promotions to lieutenant. This preferred approach was not implemented, however, ostensibly because of the expense, although no cost estimate was ever prepared.

Instead, defendants chose a promotion test comprised of three parts, a written examination, an oral interview and the average of the applicant's last four performance ratings as a sergeant. The results of each part were weighed, 40 percent, 30 percent, and 30 percent, respectively, and then combined to produce a composite score. This composite score was used to rank applicants for the final promotion eligibility list from which new lieutenants were to be selected.

The examination was taken during 1977 by 1062 applicants and composite scores ranged from 70 to 95.91. As of the time of the District Court decision in this case, the top 108 persons on the list had been promoted in order based on their position on the eligibility list.

PROCEEDINGS BELOW

This litigation has its roots in similar proceedings initiated 15 years ago. In 1974 the District Court invalidated various employment and promotion practices of the Police Department, *United States v. City of Chicago*, 385 F. Supp. 543 (N.D. Ill. 1974), *aff'd.*, 549 F.2d 415 (7th Cir.) *cert. denied* 434 U.S. 875 (1977). In that instance, the Court invalidated the Police Department's examination for promotion to sergeant as discriminatory and found that the examinations had no demonstrable relationship to successful job performance as sergeant. Similar findings were made with respect to procedures and examinations for hiring patrolmen. *United States v. City of Chicago*, 385 F. Supp. 543, 554-61. The sergeant's examination found faulty in that case was very similar to that challenged herein. *Id.* at 550. The Court prohibited the use of such examinations for purposes of determining promotions until defendants could establish the relation of the test to job functions or the absence of discriminatory impact. *Id.* at 546.

Plaintiffs in the present case were black sergeants who had taken the lieutenancy test described at p. 5, *supra*.[1] They initiated this proceeding in 1980 challenging the lieutenant's examination as a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Petitioners, white and hispanic sergeants who had also taken the lieutenant's examination, intervened as plaintiffs arguing that the examination was so deficient as to be arbitrary, thereby denying them rights protected by the Due Process Clause of the Fourteenth Amendment. Defendants were the City of Chicago, the Chicago Police Department, the Superintendent of the Police Department at the times relevant to this case, and the Director of the Chicago Personnel Department at the times relevant to this litigation. A bench trial was held by the District Court and the Court issued its decision and order on April 18, 1984. See Appendix at A-11 to A-29.

The Court's decision dealt at length with the serious inadequacies of the lieutenant's examination. The Court found that plaintiffs had established a *prima facie* case that the test had a discriminatory impact upon blacks in its entirety and with respect to its component parts. The Court also found that defendants had failed, in response to plaintiffs' showing, to carry their burden of demonstrating that the examination had a manifest relationship to the job of lieutenant. Further, the Court held that defendants wholly failed to show that the tasks on the examination, in whole and in part, substantially represented the tasks required of lieutenants, or in any significant way measured the skills relevant thereto. Based on these findings, the Court ruled in favor of the

[1] See list of parties, *supra* at ii. Named plaintiffs represent a class of all black persons adversely affected by the lieutenant's examination certified by the District Court pursuant to Fed. R. Civ. P. Rule 23(b)(2).

original plaintiffs and found the examination to be in violation of Title VII. Inexplicably, however, the Court did not find that plaintiffs-intervenors, petitioners herein, were entitled to relief even though the examination was clearly not job-related. Instead, the Court stated that a finding of a lack of job-relatedness for the purposes of a Title VII claim was not necessarily equivalent to a finding that the examination was also arbitrary and capricious so as to deprive petitioners of Due Process and merely denied relief without considering petitioners' claims.[2]

Petitioners appealed the District Court's decision to the Seventh Circuit Court of Appeals.[3] The issue presented for review was whether a civil service promotional procedure found to yield results unrelated to the ability of applicants to perform the job for which they were being tested violated applicants' due process rights. Petitioners noted in their brief that *DiIulio v. Board of Fire and Police Commissioners*, 682 F.2d 666 (7th Cir. 1982) ("*DiIulio*") established that applicants for civil service promotions have a liberty interest in merit-based promotional procedures, suggested without extensive discussion that petitioners also had a property interest therein, and argued more fully that the facts established by the District Court required a finding that the examination did not measure "ascertained merit" or have a "direct and substantial relation" to the job, pursuant to relevant law, thereby depriving petitioners of their Due Process rights. Respondents did not, in their brief, deny that petitioners had a protectible interest in the challenged promotional

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[2] The Court's finding implicitly accepted the necessary premise that petitioners had a protectible interest in defendant's promotional procedures sufficient to support a due process claim.

[3] Neither plaintiffs nor defendants below appealed the lower court opinion. Therefore, the District Court's decision that the promotional examination did not measure applicants' abilities for lieutenancies was not challenged and is not at issue.

procedures but argued only that the evidence did not support a finding that the procedures were arbitrary and capricious. Petitioners, therefore, did not discuss the protectible interest question in their reply brief. On oral argument, the question of whether a protectible interest existed arose only through scattered questioning and was not discussed by either side at length. Respondents, in fact, conceded the continuing validity of *DiIulio* and did not request that it be overturned.

The Court of Appeals issued its decision on July 1, 1985 affirming the District Court decision. In its opinion, the Court noted that the basis for the District Court's conclusion that the examination was not arbitrary and capricious was "unexplained". The Appeals Court went on to state that, if there were a constitutional right involved, it would have been forced to remand to the District Court for an explanation of its conclusion that a test which was not job-related was still adequate to meet constitutional standards.

The Appeals Court, however, did not so hold because, in its judgment, petitioners did not have either a liberty or property interest in merit-based civil service promotional procedures. With respect to a property interest, the Court recognized that the job of a tenured civil servant is property and, further, that state and municipal law require civil service promotions to be based on "ascertained merit," seniority and examination. The Court found that these provisions create an expectation that promotional procedures will be fair; the Court concluded, however, that such an expectation did not constitute property for constitutional purposes. In reaching its conclusion, the Court assumed that only a limited number of lieutenants would be available and therefore no applicant could "expect" that a good grade on an examination would lead to a promotion. Further, the Court's conclusion rested on

the assumption that promotional decisions, notwithstanding the statutory provisions, are essentially discretionary, and more so "as one moves up in a hierarchy". Since promotions were not governed by fixed rules and promises, in the Court's mind, there was no entitlement to a fair promotional examination as a matter of right.

The Court similarly dismissed the concept that a liberty interest was involved, and explicitly overruled *DiIulio* in so holding. The Court again recognized that a person may have a liberty interest in an occupation or job. The Court reasoned, however, that ranks within an occupation are not "occupations" in and of themselves. Therefore, the Court held, that while preventing someone from advancing in his occupation is a "cruel deprivation" it does not constitute a constitutional deprivation of liberty.

Finally, the Court found that even assuming a constitutional right to job-related promotional examinations, no due process violation inhered in petitioners' failure to pass a poorly designed test, although the Court conceded that a valid state claim might lie. The Court felt that such a constitutional violation would be present only if the challenged state practice were "deeply repulsive to the feelings of Supreme Court Justices" and that a "stupidly designed" and "hopelessly maladapted" examination did not so shock its conscience. The Court also relied, in part, on the idea that a state forum would be sufficient to address petitioners' claims in that respect.

Pursuant to Rule 16(e) of the Seventh Circuit's Rules of Practice, the Court's opinion was circulated to all judges of the Court; no judge voted to rehear the case *en banc*.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

A. The Decision Below Will Have Major Consequences For The Public Interest And Involves An Issue On Which Federal Courts Have Reached Conflicting And Uncertain Conclusions.

The federal government, most states and a large number of municipalities and other governmental bodies have established civil service systems for their employees. Such systems typically govern the means and criteria by which significant employment decisions are to be made, including hiring, transfers, promotions, salary increases, disciplinary actions and discharges. Millions of public employees and their employers are substantially affected by any significant change in the nature and scope of civil service procedures such as those involved in the decision below.

Civil service systems are grounded on the fundamental premise that merit, rather than politics, nepotism, or whimsy should be the basis for all significant public employment decisions. Employees are to be assured of fair and consistent treatment based on their respective abilities, diligence, and quality of work. On the other hand, public employers are provided with a system of incentives by which they can encourage and reward meritorious performance and discourage or eliminate incompetence and laziness. A properly designed and operated civil service program must carefully balance these protections and the resulting expectations of both sides; the end result is intended to be the promotion and preservation of a stable and professional work force capable of providing efficient and effective government services, for the benefit of the

public in general. *People v. Errant*, 229 Ill. 56, 61, 82 N.E. 271 (1907); *see Arnett v. Kennedy*, 416 U.S. 134, 148-50 (1974).

The promise of merit-based employment decisions which is at the core of this balanced system is only meaningful to the extent employers are willing and able to accurately identify and measure merit as it is relevant to the employment decision in question. The objectives of civil service systems will be thwarted if merit either cannot be measured, or is not properly ascertained, with respect to important personnel questions. In turn, the ability of employees to enforce the proper determination of merit where employers are unwilling to do so is critical to assure the effective operation of the entire system and the protection of employers' rights. Accordingly, the issue presented herein, the extent to which the federal Constitution protects civil service employees' rights to expect equitable, merit-based decisions, is of critical importance not only to the parties in this case and their counterparts across the country but also to the public. The issue presented by this case is therefore appropriate for the issuance of a writ. *Labor Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951); *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

In addition, while an "open and embarassing" conflict between federal Courts of Appeals may not exist with respect to this issue, there is a substantial degree of uncertainty and disagreement over the proper resolution of this question among various federal courts. This confusion is evidenced quite clearly by the Seventh Circuit's rapid reversals on this issue; as the Court below notes, it has reversed itself twice in six years. Compare *Webster v. Raymond*, 599 F.2d 793 (7th Cir. 1979) with *DiIulio v. Board of Fire and Police Commissioners*, 682 F.2d 666 (7th Cir. 1982); and compare *DiIulio* with the decision below. Other decisions within the Circuit also reflect a

fundamental rift concerning the appropriate determination and scope of constitutional property rights in civil service employment decisions. *See Vail v. Board of Education of Paris Union School District No. 95*, 706 F.2d 1435 (7th Cir. 1983) (2-1 decision, Posner, J., dissenting); and *Begg v. Moffitt*, 555 F.Supp. 1344 (N.D. Ill. 1983); *see also Hermes v. Hein*, 511 F.Supp. 123 (N.D. Ill. 1980), *aff'd in part* 742 F.2d 350 (7th Cir. 1984).

The conflict and uncertainty experienced by the Seventh Circuit is not peculiar to that Court but reflects the difficulty and importance of the issue and the large degree of uncertainty in the federal courts as to its proper resolution in the absence of a definitive Supreme Court decision. While the issue may have fortuitously been raised more frequently in this Circuit, other federal courts have experienced similar difficulties and conflict in their initial attempts at reaching a proper decision. The First Circuit has also struggled with this issue, stating, without so ruling, that Massachusetts statutory language very similar to the Illinois statute here may indeed create a property interest in fair evaluations for civil service promotions. *Lavash v. Kountze*, 604 F.2d 103, 105 (1st Cir. 1979). Several other Circuits have rejected a property or liberty interest claim only because, on the facts of the particular case, the applicant's claim for promotion had not been perfected, implying that on better facts a property interest might exist. *Robb v. City of Philadelphia*, 733 F.2d 286 (3d Cir. 1984); *Doyle v. University of Alabama*, 680 F.2d 1323 (11th Cir. 1982) (salary recommendation). Still other Circuit Courts have addressed the issue in cases where no statute existed, where the statute permitted substantially greater discretion in promotional procedures than Illinois laws, and in university tenure cases which generally involve decision-making processes less circumscribed then civil service promotions; again, the implication is that with a stronger statutory or factual basis, a

property or liberty interest might properly exist. *Hermes v. Hein*, 742 F.2d 350 (7th Cir. 1984); *Beitzell v. Jeffrey*, 643 F.2d 870 (1st Cir. 1981); *Burns v. Sullivan*, 619 F.2d 99 (1st Cir. 1980); *Clark v. Whiting*, 607 F.2d 634 (4th Cir. 1979). Thus while other Circuits have rejected particular claims of property or liberty rights based on facts and circumstances significantly less supportive of such claims, than the current case, they have uniformly refused to categorically reject, as the decision below does, the potential existence of an entitlement, given proper facts.

The District Courts have reacted in a similar fashion although the conflict with the Seventh Circuit is even clearer. District Courts have explicitly found a protected interest in merit based promotional procedures for civil servants, contrary to the decision below. *Ka Nam Kuan v. City of Chicago*, 563 F.Supp. 255 (N.D. Ill. 1983); *International Ass'n of Firefighters, Local 2069 v. City of Sylacauga*, 436 F.Supp. 482, 489-90 (N.D. Ala. 1977). Other District Courts have implied the existence of constitutional interests. *Bara v. Aurora Civil Service Commission*, 580 F.Supp. 212 (N.D. Ill. 1983); cf. *Catrone v. Massachusetts State Racing Commission*, 404 F.Supp. 765 (D. Mass. 1975).

The uncertainty and diversity of viewpoints outlined above demonstrates a state of instability not only in the lower courts but also necessarily reflects a similarly volatile environment for all affected parties, whose rights and obligations are unclear and shifting. This is especially true for civil service agencies in the Seventh Circuit, which have been subject to dramatic instability over the past several years. Given the conclusions of other federal courts to date, it appears likely that the conflict and confusion will increase rather than decrease over time, rather than being conclusively resolved by the lower courts. The facts of this case present a clear opportunity for this Court to rule on the issue and to definitively clarify the

law in this area, thereby permitting all affected parties nationwide to effectively establish and operate their civil service programs. The diversity of opinions in the lower courts, the need to resolve the issue for the effective operation of government across the country, and the number of persons affected by the issue and the decision below, makes this case one of sufficient importance to justify the issuance of a writ by this Court. *United States v. Constantine*, 296 U.S. 287, 290 (1935).

B. Petitioners Have Established A Constitutional Property Interest In Promotional Procedures Which Measure Job-Related Merit.

This Court established its framework for analysis of property interests in employment in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972). In *Roth*, the Court held that for a person to have a property interest in a benefit, he must have a "legitimate claim of entitlement to it". Such property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits". *Roth, supra*, at 577. Understandings may not be abstract or unilateral but must be mutual and explicit. *Id.*; *Sindermann, supra*, at 601. Sources of protected property rights may include not only written statutes, regulations, rules and judicial decisions but also implied contracts, *Bishop v. Wood*, 426 U.S. 341, 344 (1976), well-established patterns of practice or any other identifiable means creating mutual cognizable expectations.

The types of interests which the Court has determined to be protected as property are "varied and, as often as not, intangible, relating to 'the whole domain of social and economic fact' ". *Logan v. Zimmerman Brush Co.*, 455

U.S. 422, 430 (1982). This Court, then, has sought to define "property" in a manner which reflects its practical significance for people, i.. furtherance of the idea that it "is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Roth, supra,* at 577.

Unfortunately, the decision of the Seventh Circuit fails to comprehend the importance of merit-based promotions to civil servants and their reliance upon procedures designed to protect that interest. The abstractness of the Court's decision is compounded by its failure to consider the numerous bases creating a protected property interest. As outlined in detail below, the sources of law and mutual understanding herein include state statute, municipal ordinance and regulations, federal court decisions, and the promises and practices of defendants with respect to their promotional procedures for lieutenants. The combination of these factors leaves little doubt as to the existence of a property interest protected by the Constitution.

The Illinois Municipal Code expressly provides that a civil service commission

> shall, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion.

Ill. Rev. Stat. ch. 24, § 10-1-13 (1983). Pursuant to this statutory directive the City of Chicago Municipal Code provided, until 1981, that

> It is the general purpose of this ordinance and it is necessary in the public interest, to establish a system of personnel administration that meets the social, economic, and program needs of the people of the City of Chicago, to provide for a professional and progressive merit system for employment and to insure

> flexible career service within the City of Chicago by substituting a public employment system superseding the Civil Service System now operating within the City of Chicago pursuant to the law of the State of Illinois.

Chicago, Ill., Mun. Code, § 25.1-1 (1977).[4] In order to effectively implement the examination requirement of the Illinois statute, the City Personnel Code provides that

> All examinations shall relate to those matters which will test fairly the capacity and fitness of the applicant to perform efficiently the duties of the position.

Chicago, Ill., Personnel Code, Rule VI, § 2 (1981).

On their face, these laws unambiguously require that promotions be based on "ascertained merit" and seniority;[5] merit is, in turn, to be ascertained through examination which must fairly test the abilities of the applicant relative to the functions of the job to which he is seeking promotion. It would be difficult to envision and articulate a clearer entitlement to promotional procedures which fairly determine job related ability. Illinois courts have repeatedly interpreted such clear requirements to be mandatory upon the applicable public officials. *See People v. Nicholls*, 45 Ill.App.3d 312, 316, 359 N.E.2d 1095, 1099 (5th Dist. 1977), *aff'd in part and rev'd in part on other grounds*, 71 Ill.2d 166, 374 N.E.2d 194 (1978).

In particular, Illinois courts have found that such provisions severely circumscribe the discretion of civil service employees by replacing such discretion with merit-based

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[4] This provision was revised in 1981 without substantially affecting its intent or meaning. See Chicago, Ill., Mun. Code, § 25.1-1 (1982) at page 3, *supra*.

[5] The use of seniority is based implicitly upon merit as well; the law merely permits civil service agencies to presume that an applicant has obtained knowledge, skills, and judgment through his job experiences which are related to the position for which he is applying.

procedures for promotions. *See People v. Foster*, 67 Ill.2d 496, 367 N.E.2d 1320 (1977); *Burns v. Sheriff's Department Merit Comm'n*, 86 Ill.App.3d 226, 407 N.E.2d 1134 (4th Dist. 1980). The courts have found that the relegation of promotion decisions to unbridled discretion is inconsistent with the basic requirement that such decisions be merit-based. *Burns v. Sheriff's Department Merit Comm'n, supra*; *see People ex rel. Gaynor v. Board of Fire and Police Commissioners*, 14 Ill.App.2d 329, 144 N.E.2d 763 (1957) (once eligibility list is complete duty to promote from list is clear, ministerial, and enforceable by mandamus); *People ex rel. Cadell v. Board of Fire and Police Commissioners*, 345 Ill.App. 415, 103 N.E.2d 666 (4th Dist. 1952). Illinois courts are therefore unwavering in support of the clear terms of the law: promotions must be based on merit.

This interpretation does not prohibit the fair use of professional judgment as one part of a promotional procedure designed to assess applicants' abilities. Courts have noted that the precise means of ascertaining applicants' merit is left by law to the judgment of the civil service commission. *Lenert v. Wilson*, 56 Ill.App.2d 325, 206 N.E.2d 294 (1st Dist. 1965). Further, the inclusion of a superior's rating or efficiency ratings by superiors as *one element* of a merit-based promotional procedure has been approved where carefully circumscribed. *Zuelke v. Board of Fire and Police Commissioners*, 79 Ill.App.3d 1080, 398 N.E.2d 1080 (1st Dist. 1979). The method chosen by the commission to determine promotions must still fairly identify applicants' merit, however, as must the means of rating applicants' prior performance and efficiency. The principled use of ratings, guided by criteria related to merit, does not render a procedure "discretionary"; if ratings were truly unguided and discretionary, or if they were so influential as to be determinative of the applicant's final score, their use would be inconsistent with the require-

ments of the statute. *Burns, supra*; *see Hauri v. Batzel*, 71 Ill.App.3d 164, 389 N.E.2d 257 (2d Dist. 1979).

In this sense, the Court below erred in finding that the Illinois law relied upon here does not create anything but a discretionary promotional procedure.[6] The Court cites *Sullivan v. Board of Fire and Police Commissioners*, 103 Ill.App.3d 167, 430 N.E.2d 636 (2d Dist. 1981), for the proposition that the law did not intend to create a property right in merit-related promotional examinations. *Sullivan*, however, does not support such a broad conclusion; the applicant in that case was merely a probationary employee, and Illinois law specifically excludes probationary employees from civil service protections. The provisions of law with respect to petitioners herein were therefore not at issue. *Id.* Similarly, *McCoy v. Board of Fire and Police Commissioners*, 79 Ill.App.3d 742, 398 N.E.2d 1020 (1st Dist. 1979), cited for the proposition that promotions are discretionary under Illinois law, does not so hold. *McCoy* holds instead that where a statute provides that any one of the top three applicants on the eligibility list may be selected, the selection of such an applicant relative to his two competitors is discretionary. Such a narrow finding does not render the underlying procedure by which the eligibility list is determined discretionary and, in fact, such a conclusion is again patently inconsistent with the terms of the statute.

Similarly, in order to circumvent the clear intent and purpose of Illinois law, the Court rested its analysis on assumptions which are without basis in fact or law. For example, the Court's decision concludes that one has no right to a good efficiency rating, since such a rating is

[6] On its face, this conclusion means either that the Illinois General Assembly and Chicago City Council so inartfully drafted the law as to make it totally ineffectual or that the Illinois courts have eviscerated the law with their interpretations.

discretionary. The Court again confuses the exercise of professional judgment against merit-based criteria with unbridled discretion. Moreover, petitioners are not seeking to validate a "right" to a good rating; they are seeking recognition of the right to have ratings based on merit-related criteria and procedures, which adequately transform the process from one of pure discretion to one based on the fair and reasonable use of professional judgment. See *Hauri v. Batzel*, 71 Ill.App.3d 164, 389 N.E.2d 257 (2d Dist. 1979).

The Circuit Court also found that no property right was created because "with few lieutenancies available no one can have much confidence of doing well enough on the exam to become a lieutenant." This, again, confuses the issue, which is the right of petitioners to a fair and merit-based examination for promotion to lieutenant, not lieutenancies themselves. In that respect, petitioners' expectations are firmly and concretely grounded in state and municipal law. Moreover, the Court's assumption that only a few lieutenancies are available is openly contrary to the record. As the District Court noted, 108 applicants had already been promoted by the time of its decision, which is over 10 percent of the applicant pool. An able candidate, whose abilities are fairly ascertained, could certainly expect to perform well and thereby have a substantial likelihood of promotion. Such a likelihood is dramatically reduced or eliminated where ability is not properly measured.

The decision below also rested on the unsupported assumption that discretion plays a larger part in the promotional procedures for lieutenancies than for promotion to lower ranks, "since discretionary factors loom larger as one moves up in a hierarchy." Presumably, then, prospective lieutenants have less of a property interest than prospective sergeants. Yet Illinois and Chicago laws make no distinction between such ranks or their ability to rely

on merit-based promotion rather than arbitrary discretion. Captaincies are also subject to civil service protection. Only the top administrators and policy makers are left subject to the whim of political appointment. *Ill. Rev. Stat.* Ch. 24, § 10-1-17 (1983). *See People ex rel. Cadell v. Board of Fire and Police Commissioners*, 345 Ill.App. 415, 103 N.E.2d 666 (4th Dist. 1952). Accordingly, the conclusion that petitioners' interest in a fair and merit-based examination is somehow diminished due to their rank is unjustified in law or in fact.

In short, the Court of Appeals' conclusion that Illinois law and Chicago ordinances and regulations create only a unilateral or insubstantial expectation in merit-based promotion procedures is directly contrary to the applicable law and inconsistent with the facts of this case. Instead, the law strictly circumscribes the defendant's decision-making latitude, requiring merit-based promotion decisions, and examinations which fairly and accurately assess applicants' merit. Petitioners have a manifest and substantial interest in such examinations and decisions.

Assuming *arguendo*, however, that the combined effect of the statute, ordinance and regulation left any residual discretion in defendants' hands, such discretion has been erased by federal court decisions and the promises and practices of the defendants. As described at pages 5-7, *supra*, defendants were subject to a federal court decision ordering them to use promotional procedures which were not discriminatory and which accurately identified and measured job-related abilities. *United States v. City of Chicago*, 385 F.Supp. 543 (N.D. Ill. 1974), *aff'd* 549 F.2d 415 (7th Cir.), *cert. denied* 434 U.S. 875 (1977). The District Court's decision was issued prior to initial preparation of the lieutenant's examination challenged herein. While directly applicable only to patrolmen's sergeant's tests, the terms of the decision put defendants on notice that all similar promotional examinations, including those

for lieutenancies, would need to meet similar standards.[7] Thus, it would certainly be reasonable for petitioners to expect respondents to develop a lieutenant's examination which would be non-discriminatory and merit-based, and for respondents to do just that, consistent with the District Court's decision.[8]

Not only did both petitioners and respondents expect that meeting the obligations of Title VII and the District Court's decision would require a job-related promotion examination for lieutenant, both sides also understood that this particular examination was designed, administered and scored in a manner which was intended to ascertain candidates' merit to perform the duties of a lieutenant. It is clear from the City's preparation of the examination that it was striving to ensure that the test, in whole and in part, accurately measured ability relative to a lieutenant's job functions. Further, the City official in charge of test development testified below that he had represented to members of the police department that this lieutenant's examination would be and was a valid examination and would measure candidates' merit for the job of lieutenant. The same official, who also served as a rater for the oral examinations, indicated that candidates were aware of and understood this representation. A Deputy Chief of Police involved in the preparation and administration of the test testified unequivocally that both the testers and candidates expected the examination to ascertain

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[7] Several of the petitioners were intervenors in the earlier case and therefore were fully apprised of the earlier proceedings and decision.

[8] The District Court's finding that examinations were discriminatory and without a "manifest relationship to the employment in question," while technically benefitting only black policemen, necessarily also benefitted other officers as well, since any new nondiscretionary, job-related test would be given to all applicants. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). *See also Connecticut v. Teal*, 457 U.S. 440 (1982).

merit. Finally, the promotion of the top 108 sergeants on the eligibility list without exception, as determined by the results of the examination, confirms the City's understanding that promotions would be based solely on merit, as measured by the test, and dispels the notion relied upon by the Court below that such a list was essentially advisory or that selection therefrom was purely discretionary.[9]

In short, even if state law permitted some room for discretion in the promotional process for civil servants, in this instance, the respondents were under additional obligations to promote based on merit and had fully accepted such obligations, with the full knowledge and understanding of petitioners and other applicants. The Court of Appeals' conclusion, therefore, that the promotional examination was discretionary and need not be merit-based is wholly without foundation in this case. Accordingly, petitioners have demonstrated a concrete and substantial property interest based upon state law, municipal ordinance, federal court decisions and the explicit understandings between petitioners and respondents.[10]

This conclusion is consistent with this Court's decisions as well. Without a doubt, the right to be fairly tested for promotion is one which civil servants rely upon in their daily lives, not just with respect to the next available grade, but in deciding to join the service in the first place.

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[9] Rule VI of the Personnel Code, quoted above at page 4, was adopted in 1981, after the lieutenant's examination was taken, but nevertheless also is indicative of the City's intent and purpose with respect to promotional examinations.

[10] It should be noted that the Court of Appeals seems to rely as well on the theory that petitioners' right to seek a state remedy diminishes their claim of entitlement to constitutional protection. Such a conclusion is openly at odds with this Court's decisions. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). If anything, the Circuit Court's concession that petitioners may have a valid claim for relief under state law belies the validity of its arguments belittling the strength of state law guarantees as to merit-related promotions.

Roth, supra at 577; *Bishop v. Wood*, 426 U.S. 341, 353-4 (1976) (Brennan, J., dissenting). The statutory entitlement is as clear as that in *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985), in which this Court found a property interest in continued civil service employment. *See also Sindermann, supra.* Conversely, the statutory and judicial entitlements and mutual understandings are substantially stronger than those found lacking in *Bishop v. Wood, supra.* The property interest claimed herein is firmly within the scope of the types of interests grounded in state law which cannot be removed without "cause": petitioners have a tangible and significant interest in promotional evaluations based on merit, an interest at least as important as others found protected by this Court. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982) and cases cited therein. Consequently, this Court should issue a writ and reverse the Seventh Circuit decision on the grounds that petitioners have a protected property right in merit-based promotional procedures.

C. Petitioners Have A Liberty Interest In A Meaningful Opportunity To Advance Within Their Profession Based On Their Qualifications.

This Court has long recognized that the Fourteenth Amendment protects individuals in the enjoyment of their chosen occupation. *Board of Regents v. Roth, supra,* at 572, citing *Meyer v. Nebraska*, 262 U.S. 390 (1923). This liberty interest in employment has consistently been protected in cases where the State interposes examinations or other barriers to entry in a profession or occupation. In such instances, this Court has held that barriers to entry must have a rational relationship to the applicant's qualifications or fitness to engage in the occupation. Thus, in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) and *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957), this Court held that while a State may impose standards for entry into the legal profession, such

requirements must be rationally connected with the fitness or capacity of the applicant to practice law. *See Graves v. Minnesota*, 272 U.S. 425, 428 (1926) (upholding a state requirement that an applicant for a dental license have a diploma from a reputable dental college, because the requirement had a "direct and substantial relation to [the plaintiff's] qualification to practice dentistry".) In *Konigsberg v. State Bar of California*, 366 U.S. 36, 41 (1961), the Court upheld State denial of an application for admission to the bar for failure to answer application questions only once it concluded that the questions had "substantial relevance" to the applicant's qualifications. This standard has also been applied to public employees. *Wieman v. Updegraff*, 344 U.S. 182 (1952). And, in *DiIulio v. Board of Fire and Police Commissioners*, 682 F.2d 666 (7th Cir. 1982), the Seventh Circuit extended similar liberty interest protection to applicants for promotion within the police department.

In overruling *DiIulio*, the decision below focused on only one premise, namely, that while the Constitution protects a person's liberty and right to engage in an occupation, ranks or subdivisions within an occupation are not an "occupation" in and of themselves. Therefore, petitioners, for example, would have no liberty interest in being able to seek employment as a police lieutenant, based on their abilities, since being a police lieutenant is not an "occupation" distinct from being a police sergeant.[11]

This distinction, however, while attractive in a superficial, abstract way, is inconsistent with the operations of the real world. The fact that the State imposes an examination as a barrier to entry to a higher rank, a barrier ostensibly based on ability, is a clear indication that the

[11] Apparently, the Court of Appeals defined "occupation" for purpose of this case to mean "police officer," including presumably, patrolmen and everyone up to and including Chief of Police.

state views the functions of persons holding such a rank as significantly different than those of the lower rank, at least significant enough to warrant a job-related test for promotion. Thus, in a very real sense, the State creates a distinct "occupation" when it deems it important enough to impose requirements for entry thereto, satisfaction of which is the only means by which a person can engage in that occupation.

Conversely, it is obvious that persons consider the ability to advance themselves, to aspire within an "occupation" as a valuable component of the right to employment. Freedom and fair opportunity to progress carries rewards of personal satisfaction and, typically, tangible benefits as well. People, in selecting an occupation, rely on such opportunities; the protection of such opportunities is a critical part of the civil service, in particular, which in its purposes and rules recognizes the value of a chance for fair advancement. Without the ability to progress, among other things, the liberty to engage in an occupation is rendered meaningless.[12]

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[12] The Court of Appeals' approach ignores this simple human fact. In its world, apparently, there is no difference between a pediatrician and a neurosurgeon, since both are doctors, even though special certification may be required for both specialities and most people would prefer not to have brain surgery performed by the former. Put differently, in the Court's view, a judge is a judge is a judge, or perhaps more accurately, a lawyer is a lawyer is a lawyer and therefore a lawyer practicing before local traffic court is no different than a Supreme Court Justice. Yet we know that lawyers aspire to judgeships and Court of Appeals' judges aspire to positions on the Supreme Court; such behavior merely reflects general human tendencies to distinguish between greater and lesser occupational roles and to seek the greater. The fair opportunity to so progress is a critical element of occupational liberty. This Court has recognized the value of such employment *opportunities* as opposed to mere *employment* in other contexts. See *Connecticut v. Teal* , 457 U.S. 440 (1982); *but see contra, Id.*, at 463, n. 3 (Powell, J., dissenting).

Third, acceptance of the analysis below would permit the evisceration of well-accepted liberty interests in occupation. Merely by redefining an "occupation" broadly, States (or judges) can eliminate rights to engage in discernible lines of work. For example, the "occupation" of educator could include elementary teachers, principals and college professors alike, swallowing any interest which one might have in engaging in such distinct occupations. Such a perspective is contrary to this Court's recognition of the difference between even tenured and non-tenured professors.[13] *See Sindermann, supra.* Moreover, the decision creates anomalous situation in that someone seeking to be hired as a police lieutenant from outside the Department would have a protected liberty interest in not being unfairly denied employment while someone seeking promotion from within would not be so protected.

In short, the distinction created by the Court below seriously misperceives the nature and importance of the liberty interest inherent in rational, merit-based procedures for promotion and is destructive of existing rights

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[13] It is interesting to note that the author of the opinion below has utilized distinctions between types of teachers in order to justify the conclusion, perhaps not surprisingly, that professors may have property rights in employment while high school football coaches do not. *See Vail v. Board of Education of Paris Union School District No. 95*, 706 F.2d 1435, 1451 (7th Cir. 1983) (Posner, J., dissenting). In *Vail*, Judge Posner relied upon Daniel Webster to assert that "no description of private property has been regarded as more sacred than college livings. They are the estates and freehold of a most deserving class of men . . .", thereby invoking a special "judicial solicitude" for college teachers. *Id.* Apparently, depending on a Judge's view of the social value of professions, a property or liberty interest in employment may or may not exist; apparently, policemen are more like football coaches than college professors, and their employment interests are not as deserving of "judicial solicitude." Such analysis reeks of the type of result-oriented, substantive due process analysis found distasteful by the Court below.

as well. Accordingly, this Court should issue a writ and reverse the decision below on the grounds that petitioners have a protected liberty interest in job-related, merit-based promotional procedures.

D. The Court Below Departed From The Accepted Course Of Judicial Proceedings In A Manner Sufficient To Warrant An Exercise Of This Court's Supervisory Powers.

As noted briefly above, the District Court in this case, while assuming that petitioners had a protected interest in merit-related promotion procedures, failed, for whatever reason, to rule on the merits of petitioners' claims. This failure is especially peculiar in light of the District Court's excoriation of respondent's procedures and its conclusion that the test was not job-related. Necessarily, an absence of relationship to the job means that the examination was arbitrary. It would appear, therefore, assuming petitioners have a protected constitutional interest in merit-based (job-related) procedures, and given a conclusion that such procedures were arbitrary, that petitioners were clearly deprived of their constitutional rights, and the Court should have so held. The Court of Appeals indicated that, in fact, the District Court's failure would constitute reversible error but for the Seventh Circuit's finding that petitioners had no protected constitutional interest.

The proceedings before the Court of Appeals were perhaps even more fundamentally contrary to proper judicial procedure. The issue presented for appeal did not involve the question of whether a protected constitutional interest existed. That question was decided in favor of petitioners below, albeit implicitly, the *DiIulio* decision was apparently good law and fully applicable to the case at bar, and respondents never challenged the existence of such an interest. Thus, the only issue on appeal was whether the

District Court had erred in not ruling on petitioners' claims.[14]

As a result, petitioners (appellants below) did not, and had no reason to, know that the Court of Appeals contemplated the overruling of *DiIulio* or the examination of the question of the existence of property or liberty interests. Petitioners did not brief the issue below; respondents (appellees) did not challenge the validity of *DiIulio* or the existence of a protected interest in their brief. On oral argument, the issue was not extensively discussed, although the value of such a discussion would have been of dubious value since neither side was aware that the issue was being considered. Consequently, the decision of the Court below was reached without benefit of briefs and informative oral argument and parties were denied notice of the issue and any meaningful opportunity to present argument thereon.

Such a fundamentally flawed procedure has never been allowed to stand by this Court with respect to the rights of litigants on trial. As a bare minimum, the basic concept of due process involves notice of the opposing claims and a meaningful chance to respond. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

At the appellate level, this concept is no less applicable where a new issue is raised without warning. Such a process not only deprives the parties of a meaningful appeal but encourages judicial overreaching and results, as often as

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[14] More precisely the question presented for review was: "whether a civil service promotional examination and procedure violates the Due Process rights of the applicants when the examination and procedure is found by the trial court to yield results unrelated to the ability of the applicants to perform the job being tested for." Appellant's Initial Brief at 2.

not, in bad law.[15] A decision reached by a judge without benefit of participation by the parties hardly inspires confidence in the result, relative to normal appellate procedure involving a focused and considered deliberation of issues by counsel and the court.

The Seventh Circuit's independent and expansive reinterpretation of issues and denial of meaningful opportunity for argument thereon, combined with the District Court's failure to rule on petitioners' claims, means that petitioners have effectively been deprived of a fair chance to litigate their claim. Such substantial overreaching and procedural unfairness is a proper ground of issuing a writ of certiorari and for the exercise of this Court's supervisory powers. *Fountain v. Filson*, 336 U.S. 681 (1949).

CONCLUSION

The decision below attempts to resolve an important federal question of considerable difficulty and uncertainty. In its haste to reach a desired resolution of the issue, however, the Court refused to permit the parties an opportunity to participate and, as a result, its opinion seriously misinterprets the law and ignores the facts of the case entirely, choosing to substitute hypothetical circumstances which more nearly justify the result, in the manner of a law school examination for public employees and the proper functioning of civil service programs at

[15] The Court of Appeals essentially concedes this point in its opinion, relying on the absence of oral argument and deficiencies in briefing to explain the decision in *DiIulio*. Yet its own procedures herein resulted in virtually no briefing or argument on the issue it deemed critical, implying that the value of its own opinion necessarily must be even more suspect.

every level of government. It is essential that a well-considered and sensitive decision be made, with full opportunity for argument. Petitioners, therefore, respectfully request that this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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85-574 (3)

No.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAURICE THOELE, LOUIS ARADO, HUGH HERATY, GARVIN NIX, JOSEPH LORENZ, MICHAEL GRIEGEL, WILLIAM McCORRY, DENNIS JYRKOWSKI, JOSEPH MUCIA, ROBERT MURRAY, JAMES ORR, RICHARD KIMBLE, JOHN KACHKA, ALEX McCRAE, FRANK SADLER, THOMAS MINASOLA, GEORGE HEAD, LEONARD MIJKA, JOHN VOLLAND, RONALD JABLON, RICHARD RICCIO, ARTHUR BISCHOFF, JAMES GEOGHEGAN, JOHN DUFFY, DANIEL McCRORY, WILLIAM DEVONEY, ROY WALKER, ALBERT POHL, ROBERT KEATING, RUSSELL ALONGI, KENNETH BRINGE, JOHN CULLOTON, JOHN TOLLEY, JOHN J. MURPHY, HUGH O'MALLEY, CARL NEUMULLER, JAMES BEGLEY, JAMES MORGAN, WILLIAM O'BRIEN, RAYMOND GREENWOOD, THOMAS CRONIN, THOMAS BRADY, TERRENCE McCUE, ROBERT TILL, FRANKLIN CRAWFORD, RAYMOND GIEHOOB, DANIEL MORAN, PATRICK LOGAN, TERRENCE FORBES, RALPH MORETH, JAMES P. BROWN, PAUL C. CEFFALIO and CHARLES R. LOFTUS, individually and on behalf of all others similarly situated,.

Petitioners,

v.

CITY OF CHICAGO, CHICAGO POLICE DEPARTMENT, RICHARD J. BRZECZEK and CHARLES H. POUNIAN,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAURICE THOELE, et al.,

Petitioners,

VS.

CITY OF CHICAGO, et al.,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-2284

WILLIAM C. BIGBY, et al.,

Plaintiffs,

and

MAURICE THOELE, et al.,

Intervening Plaintiffs-Appellants,

v.

CITY OF CHICAGO and
CHICAGO POLICE DEPARTMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 80 C 5246—**Prentice H. Marshall,** *Judge.*

ARGUED APRIL 18, 1985—DECIDED JULY 1, 1985

Before CUDAHY and POSNER, *Circuit Judges,* and PELL, *Senior Circuit Judge.**

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* Pursuant to Circuit Rule 16(e) (rehearing en banc, *sua sponte,* before decision), this opinion was circulated, before publication, to all the judges of the court in regular active service, because it overrules *DiIulio v. Board of Fire & Police Comm'rs,* 682 F.2d 666 (7th Cir. 1982). No judge voted to hear the case en banc.

POSNER, *Circuit Judge.* A group of black police sergeants brought suit against the City of Chicago under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, alleging that the City had discriminated against them by refusing to promote them to lieutenant, because they had failed a lieutenants' examination which they contended was racially biased. A group of white and Hispanic police sergeants was allowed to intervene in the suit, to challenge the exam on a different ground: that it simply was not related to what a lieutenant does, and therefore violated the intervenors' rights under the due process clause of the Fourteenth Amendment. The district judge, after a bench trial, held in favor of the plaintiffs (the black sergeants) but against the intervenors. The judge's entire discussion of the intervenors' claim is as follows: "Although we have found defendants' 1977 lieutenants examination invalid under Title VII, it does not follow that it was arbitrary and capricious so as to entitle the intervenors, Maurice Thoele, et al. to recover under the Due Process Clause of the fourteenth amendment. While they may be the beneficiaries of the Bigby plaintiffs' victory, they are not entitled to any relief in their own right." They appeal.

It might seem that as "beneficiaries" of the plaintiffs' victory (from which, incidentally, the defendants have not appealed), the intervenors would have no standing to complain that the district court had failed to award them "relief in their own right"; it might seek that by knocking out the exam the plaintiffs had gotten everything the intervenors wanted. But the district judge ordered the immediate promotion of 11 black sergeants to lieutenant. If he had found that the intervenors' constitutional rights had been infringed as well as the plaintiffs', he surely would have ordered some of the intervenors promoted immediately, instead or in addition. Their claim is not moot.

The district judge rejected the claim on the ground that the lieutenants' examination was not arbitrary or capricious. But the basis of this conclusion is unexplained. The opinion contains many devastating criticisms of the lieu-

tenants' examination en route to the conclusion, apropos the black sergeants' claim, that the exam is not "job related" within the meaning of cases interpreting Title VII. It is true that an exam might fail to survive the exacting scrutiny to which Title VII subjects examinations that have a disproportionate impact on a protected group such as blacks yet still not be so unreasonable as to create constitutional doubts unrelated to discrimination. Indeed, it would be quite odd if Title VII provided the measure of what is due process of law in public employment. This must have been what the judge thought. But what is unclear from the district judge's opinion—which has not a good word to say about the exam—or from the record before us on this appeal is *why* he thought the exam, though not job-related, was yet not arbitrary, capricious, or in a word irrational. If it were obvious why, we could uphold the district judge's decision despite his failure to explain. But it is not obvious. So if we thought that there was a constitutional right, unrelated to racial or other discrimination, to a rational test for promotion to a higher rung in the civil service of a state or municipality, we would remand the case for the judge to explain why he thought the lieutenants' test unreasonable, though not job-related in a Title VII sense. But we do not think there is such a right. We first show how we reached this conclusion as a matter of principle, and then show that the case law supports our conclusion notwithstanding the contrary precedent of *DiIulio v. Board of Fire & Police Comm'rs*, 682 F.2d 666 (7th Cir. 1982).

The due process clause of the Fourteenth Amendment forbids a state to deprive anyone of life, liberty, or property without due process of law. To make out a case under the clause one must therefore show first that one was deprived of life, liberty, or property, and second that the deprivation was brought about without due process of law. Neither element is present here.

The Supreme Court has held that the job of a tenured civil servant is property. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1491-92 (1985). So if a City

of Chicago policeman, who under the law of Illinois cannot be fired without cause, see Ill. Rev. Stat. 1981, ch. 24, ¶ 10-1-81.1, is fired, this is a deprivation of property; and he has only to show that it was done without due process of law in order to prove a violation of the Fourteenth Amendment. But these sergeants did not have a property interest in the rank, which they had not yet attained, of lieutenant. It is true that state law requires promotions of government employees, including policemen, to be "on the basis of ascertained merit and seniority in service and examination." Ill. Rev. Stat. 1981, ch. 24, ¶ 10-1-13; see Chicago Municipal Code ¶¶ 25.1-3, 25.1-5 (1977). (The statutory provisions for police forces in smaller municipalities are slightly different. See Ill. Rev. Stat. 1981, ch. 24, §§ 10-2.1-6, 10-2.1-15. So far as the issues in this case are concerned, the current Chicago Municipal Code (1982) is identical to the 1977 Code in effect when these sergeants were denied promotion.) The statute and ordinance create an expectation that the examinations used for promotions in the civil service will be fair but, as the Illinois courts have held, not so firm and definite an expectation as to be "property" in a constitutional sense. See, e.g., *Sullivan v. Board of Fire & Police Comm'rs*, 103 Ill. App. 3d 167, 172, 430 N.E.2d 636, 640 (1981) (construing the provisions relating to smaller municipalities—provisions actually more protective of promotion rights than the provisions applicable to Chicago); cf. *Confederation of Police v. City of Chicago*, 547 F.2d 375, 376 (7th Cir. 1977). For it is not the examination that the applicant is interested in—no one likes taking tests—but the job. And with few lieutenants available no one can have much confidence of doing well enough on the exam to become a lieutenant, especially since the grade on the examination is only one factor that the promoting authorities take into account in deciding whether to promote; the others are seniority and any evidence of merit besides the examination grade, such as the officer's efficiency rating by his superiors. See, e.g., Chicago Municipal Code, § 25.1-5(6)(b) (1977); *Lenert v. Wilson*, 56 Ill. App. 2d 325, 206 N.E.2d 294, 297 (1965). One has no "right" to a good efficiency rating from one's superior; rating is an exer-

cise of the superior's discretion. See *Lenert v. Wilson*, *supra*, 56 Ill. App. 2d at 332-34, 206 N.E.2d at 298, cf. *Zuelke v. Board of Fire & Police Comm'rs*, 79 Ill. App. 3d 1080, 1082, 398 N.E.2d 1080, 1082 (1979). Yet without such a rating one is most unlikely to be promoted to lieutenant.

Furthermore, the promoting officials are authorized to choose among the highest-rated applicants, and no criteria are provided for the choice. See Ill. Rev. Stat. 1981, ch. 24, ¶ 10-1-13; Chicago Municipal Code ¶ 25.1-5(5) (1977). Construing the counterpart provision in the statute governing the police forces of smaller municipalities, *McCoy v. Board of Fire & Police Comm'rs*, 79 Ill. App. 3d 742, 744, 398 N.E.2d 1020, 1022 (1979), holds that "the promotion of a patrolman to sergeant is one of discretion," so that the plaintiff "had no vested right to promotion." The same is true of promotion from sergeant to lieutenant. Indeed it is more strongly true, since discretionary factors loom larger as one moves up in a hierarchy. Promotion to lieutenant's rank is not a matter of right and is not governed by fixed rules which if complied with automatically entitle the applicant to promotion. "To have a property interest . . . a person . . . must have more than a unilateral expectation of it. He must, instead, have a legitimate *claim of entitlement* to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (emphasis added). That is missing here.

Nor do we think the intervenors were deprived of their liberty. There is indeed a concept of liberty of occupation; it goes back to the eighteenth century, see, e.g., Madison, *Essay on Property*, in 6 Madison, Writings 101 (Hunt ed. 1906 [1792]), and is the animating concept behind a number of old decisions in which the Supreme Court struck down state laws that interfered with that liberty. See, e.g., *Smith v. Texas*, 233 U.S. 630, 637-38 (1914); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Although the Court has since abandoned the idea that the due process clause is a general charter of economic freedom, it has continued to provide limited protection for liberty of occupation. See, e.g., *Hampton v Mow Sun*

Wong, 426 U.S. 88, 102 (1976). Important examples are cases decided in the 1950s and early 1960s concerning the reasonableness of conditions on admission to the bar. See, e.g., *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). And cases such as *Codd v. Velger*, 429 US. 624 (1977) (per curiam), which hold that firing a public worker under conditions that "stigmatize" him may invade his liberty even if he has no property right in his job, seem to rest on the idea that stigmatization may prevent him from getting another position in the same line of work. See *Lawson v. Sheriff of Tippecanoe County*, 725 F.2d 1136, 1138-39 (7th Cir. 1984); *Bone v. City of Lafayette*, No. 82-1976, slip op. at 6-8 (7th Cir. May 29, 1985); *Smith v. Board of Educ.*, 708 F.2d 258, 265 (7th Cir. 1983).

But the examination challenged in this case, while it may prevent some sergeants from becoming lieutenants in the Chicago police force, does not exclude anyone from an occupation. To be a policeman is to follow a particular calling, and to be excluded from that calling is an infringement of liberty of occupation. But a particular rank in the police force is not an occupation, just as the army is not a series of separate occupations, ranging from buck private to general of the armies, and just as the private practice of law is not composed of two occupations—partner and associate. Of course a profession may have distinct occupations; the medical profession has nurses as well as doctors. Cf. *Smith v. Texas*, *supra*, 233 U.S. at 639. But ranks within an occupation—head nurse versus rank-and-file nurse, for example—are not "occupations" themselves; and while preventing someone from advancing in his occupation can be a cruel deprivation, it would stretch the idea of liberty of occupation awfully far, it seems to us, to treat a bar to promotion as a deprivation of that liberty. Cf. *Munson v. Friske*, 754 F.2d 683, 693 (7th Cir. 1985).

But even if being denied a promotion because one had flunked an unfair examination could be a deprivation of liberty within the meaning of the due process clause of the Fourteenth Amendment, the intervenors would lose; there was no denial of due process. The usual though not

exclusive modern meaning of the term is notice of charges and an opportunity for a hearing appropriate to the nature and gravity of those charges. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976). There was no denial of due process in that sense. It is not as if the city had told the sergeants that they could not take the exam, and refused to give them a chance to be heard on why they were being barred. The sergeants are not complaining about lack of notice or lack of an opportunity for a hearing or lack of any other procedural safeguards. They complain that the poor design of the examination violates due process. This has nothing to do with administrative, judicial, arbitral, or any other procedure; it has to do with the substantive criteria for promotion.

This observation does not end the case, however. Oxymoron though it is, "substantive due process" continues to be a recognized concept of constitutional law. The best known modern instance is the right to an abortion, see *Roe v. Wade*, 410 U.S. 113 (1973), a right that rests on the due process clause of the Fourteenth Amendment but that has nothing to do with notice and hearing; but there are other examples within the general area of the family and sex. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). The appellants in this case have alleged the denial of another form of substantive due process. They claim a constitutional right to be tested for promotion by examinations reasonably related to the actual needs of the position for which they have applied.

We do not believe, however, that this is a valid federal constitutional claim, even if there is (as we doubt) a sense in which the appellants may be said to have been deprived of liberty by being subjected to an unfair test that they flunked. They may have a claim under state law. Cf. *Burns v. Sheriff's Dept. Merit Comm'n*, 86 Ill. App. 3d 226, 407 N.E.2d 1134 (1980); *Beard v. Board of Police Comm'rs*, 130 Ill. App. 3d 692, 474 N.E.2d 918 (1985). Nothing said in this opinion is intended to prejudge that claim. In fact they appended such a claim as a pendent to their federal constitutional claim, and we interpret the district judge's silence about their state claim as a deci-

sion to relinquish pendent jurisdiction over it, a decision that seems reasonable in the circumstances but that in any event the intervenors do not challenge in this court.

Whatever the original meaning of "due process of law," and whatever the intentions of those who drafted and ratified section 1 of the Fourteenth Amendment, the concept has been used to invalidate state action unrelated to judicial or administrative procedure or to specific rights enumerated in the Bill of Rights only when that action was deeply repulsive to the feelings of the Supreme Court Justices. In an earlier day it was action restricting economic liberty beyond the narrow bounds thought proper by the classical economists and the ideologists of laissez-faire; more recently it has been action restricting freedom of choice in intimate personal relations. A civil service examination unfair in the sense not of oppressing some racial or ethnic group for whose members the examination may be culturally inaccessible, or even just of flunking more members of one such group than of another, but of being a stupidly designed test hopelessly maladapted to the purposes for which it is being given, does not shock the conscience. To hold that it does would result in making the federal courts a super Civil Service Commission, reviewing examinations for promotions in every civil service in the United States. The federal courts do not need this additional burden. Cf. *Bishop v. Wood*, 426 U.S. 341, 349 and n. 14 (1976).

All this is not to say that the Constitution gives black police sergeants more rights than white ones, by enabling only blacks to complain in federal court about the reasonableness of the examination for police lieutenants. The law gives more rights to victims of discrimination than to nonvictims; but the victims can be white as well as black. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976); *Rucker v. Higher Education Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982). The intervenors do not complain of racial discrimination. A federal forum may be necessary to assure the vindication of constitutional rights against racial discrimination, but for remedies against a bad exam a state forum ought to be sufficient. There is,

indeed, a conflict between the constitutional rights asserted by the plaintiffs and by the intervenors, since, as suggested in our discussion of mootness, if the intervenors won their case this might reduce the amount of relief available to the plaintiffs.

What must give us pause, though, is our decision in *DiIulio v. Board of Fire & Police Comm'rs*, 682 F.2d 666 (7th Cir. 1982), which held that white policemen in Illinois who were not alleging racial discrimination had stated a claim under the due process clause of the Fourteenth Amendment just by showing that the test for police sergeant which they had flunked did not bear a "direct and substantial" relationship to a sergeant's job. *Id.* at 669. We based this conclusion on the Supreme Court's decisions dealing with liberty of occupation, but we did not distinguish between exclusion from an entire occupation and exclusion from a particular position or rank in the occupation, nor between fair procedure and other ideas of due process.

DiIulio stands alone except for a single decision by a district court in this circuit which naturally considered itself bound by *DiIulio*. See *Ka Nam Kuan v. City of Chicago*, 563 F. Supp. 255, 257 (N.D. Ill. 1983). Occasional references in other cases to the possibility of a property interest in promotion merely assume there might be such an animal, en route to holding that the plaintiff had failed to prove a violation of the Constitution. See *Hermes v. Hein*, 742 F.2d 350, 355 (7th Cir. 1984); *Lavash v. Kountze*, 604 F.2d 103, 105-06 (1st Cir. 1979) (per curiam); *Bara v. Aurora Civil Service Comm'n*, 580 F. Supp. 212, 214-16 (N.D. Ill. 1983). Many cases are contrary to *DiIulio*. See, e.g., *Robb v. City of Philadelphia*, 733 F.2d 286, 293-94 (3d Cir. 1984) (a case factually almost identical to *DiIulio* and to the present case); *Clark v. Whiting*, 607 F.2d 634, 638, 641 (4th Cir. 1979); *Burns v. Sullivan*, 619 F.2d 99, 104-05 (1st Cir. 1980); *Doyle v. University of Alabama*, 680 F.2d 1323, 1326 (11th Cir. 1982); *Beitzell v. Jeffrey*, 643 F.2d 870, 875-79 (1st Cir. 1981); *Meyr v. Board of Educ.*, 572 F.2d 1229, 1232 (8th Cir. 1978); cf. *Levitt v. University of Texas*, No. 84-1700, slip op. at 4271-72 (5th

Cir. May 10, 1985); *Sandlin v. Johnson*, 643 F.2d 1027 (4th Cir. 1981). The most significant of the cases is *Webster v. Raymond*, 599 F.2d 793 (7th Cir. 1979), for it was a previous decision of this circuit, squarely contrary to, yet not cited in, *DiIulio*. *Webster* unanimously rejected a claim that denial of promotion to a higher rank in the civil service (in that case, promotion from teacher to principal) is a deprivation of liberty or property within the meaning of the due process clause. See 599 F.2d at 796-802. *Begg v. Moffitt*, 555 F. Supp. 1344, 1347 n. 7 (N.D. Ill. 1983), tries to reconcile the two cases on the ground that *Webster* was about "procedural" due process and *DiIulio* about "substantive" due process; but *Webster* is about substantive due process, too—the court in *Webster* said so, see 599 F.2d at 801-02. In *Altman v. Hurst*, 734 F.2d 1240, 1243 (7th Cir. 1984) (per curiam) (dictum), we cited *Webster* for the proposition "that no liberty interest is implicated where a plaintiff is denied a promotion, since he remains free to seek alternate employment if dissatisfied with his job."

Under the rules of this circuit a panel decision cannot be overruled without circulation of the overruling decision, before publication, to all the judges of the court who are in active service. See 7th Cir. Rule 16(e). That was not done in *DiIulio*; evidently the panel that decided *DiIulio* was unaware of *Webster*. This is not surprising; the briefs in *DiIulio* do not cite *Webster*, and *DiIulio* was decided without oral argument (a circumstance in which some will find an implicit message concerning the value of oral argument). Naturally the authority of *DiIulio* is less than it would be if it had considered and rejected *Webster*. We are forced to choose between *Webster* and *DiIulio*. We choose *Webster*. It accords with the great weight of authority and the recent understanding of this circuit reflected in *Altman v. Hurst*, and expresses the better view as an original matter.

The judgment of the district court dismissing the claim of the intervenors is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 5246

WILLIAM C. BIGBY, et al.,

Plaintiffs,

and

MAURICE THOELE, et al.,

Plaintiffs-Intervenors,

v.

CITY OF CHICAGO, et al.,

Defendants.

MEMORANDUM OPINION

Prentice H. Marshall, District Judge

This is an action brought by 41 black sergeants (Bigby plaintiffs) in the Chicago Police Department challenging the Department's 1977 lieutenants' promotional examination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. A class has been certified pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure in behalf of all black persons who have been adversely affected by the examination. On the eve of trial Maurice Thoele and other white and hispanic sergeants intervened as plaintiffs contending that the examination violated rights guaranteed them under the Due Process Clause of the fourteenth amendment. The defendants in the case are the City of Chicago, the Superintendent of the Chicago Police Department and the Director of Personnel of the City of Chicago.

This memorandum opinion will stand as our findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

This is a disparate impact case. The basic premises are well established. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Connecticut v. Teal*, 102 S [sic].

As the Court said in *Teal*:

> To establish a prima facie case of discrimination, a plaintiff must first show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to avoid a finding of discrimination. 102 S. Ct. at 2531.

For the reasons hereinafter stated, we hold that plaintiffs proved a prima facie case and that defendants failed in their burden.

On January 5, 1976, we entered a prohibitory injunction in *United States v. City of Chicago*, 411 F. Sup. 218 (N.D. Ill. 1976), *aff'd* 549 F. 2d 415 (7th Cir. 1977) dealing with the employment of patrol officers and the promotion of sergeants by the Chicago Police Department. Five months later defendants began preparation of an examination for the promotion of lieutenants.

The lieutenants' test was completed in 1977. It is comprised of three parts: a written examination, an oral interview, and the average of the applicant's last four performance ratings as a sergeant. The scores of the three segments were combined in a 40-30-30 ratio to produce a composite final score. Applicants were placed on the final eligibility list in rank order of their composite scores.

The examination was taken by 1,062 persons, 835 (78.63%) were white, 188 (17.7%) were black, 38 (3.58%) were hispanic and one was asian. Composite scores on the eligibility list range from a top of 95.91 to 70.

The top 108 persons on the list have been promoted in rank order. Ninety-three (86.11%) are white, eleven (10.19%) are black and four (3.7%) are hispanic. The overall rate of promotions for black applicants is 52% of the rate of promotions for white applicants. If, as defendants have urged, the top 271 were promoted, the black to white promotion rate would be 66% and if 291 were promoted, the rate would be 65.5%. These rates demonstrate a disparate impact under the "80% rule" of the Uniform Guidelines on Employee Selection Procedures. 29 C.F.R. §1607.4D (1981). *Connecticut v. Teal*, 102 S. Ct. 2525, 2529 n. 4 (1982); *United States v. City of Chicago*, 663 F. 2d 1354, 1357 n. 8 (7th Cir. 1981). Indeed, the disparate impact under the 80% rule persists as low as 355 on the eligibility list. When one realizes that the Department has never promoted more than 245 lieutenants from a particular roster, the depth of the disparate impact is determinative. Furthermore, the evidence shows that each component of the examination had a disparate impact upon black applicants whose scores were high enough to have a practical chance of being promoted.

A disproportionate number of white applicants received scores of 71 and above on the written test: 23 blacks and 150 whites received such a score. The "success rate" for blacks on the written test was 12.23%. That is 68% of the "success rate" for whites which was 17.69%.

The scores from the oral interviews likewise had a disparate impact under the 80% rule for scores of 88 and above. Fifth-eight blacks and 301 whites received scores of 88 and above, the "success rate" for blacks (10.22%) is 78% of the "success rate" for whites (13.12%).

Documents provided by the defendants established that four of the raters at the oral boards gave consistently lower scores to blacks than to whites. Defendants' expert, Alvares, recognized this disparity. Plaintiffs' evidentiary analysis demonstrated that the disparate impact or the oral scores was attributable to the four low raters.

The written and oral scores were combined to produce 70 points of the maximum final score of 100. The combined written and oral scores had a disparate impact under the 80% rule rule for scores of 58 and above; 47 blacks and 261 whites received composite scores of 58 and above. The "success rate" for blacks (25.27%) is 78% of the "success rate" for whites (32.30%).

The performance ratings showed a disparate impact under the 80% rule for scores of 88 and above. Eighty-six blacks and 476 whites received scores of 88 and above. The "success rate" for blacks (46.24%) is 78.5% of the "success rate" for whites (58.91%).

The final cumulative scores have a disparate impact under the 80% rule for scores of 84 and above. Fifty-three blacks and 302 whites received such scores. The "success rate" for blacks (28.49%) is 76% of the "success rate" for whites (37.38%). Defendants' suggestion that the disparity is reduced as one progresses down the roster to the 271st and 291st position has been previously noted as erroneous for there the black-white success ratio is 66% and 65.5%.

Defendant urges that disparities in the high 60 and 70 percentiles should not be regarded by the court as establishing a prima facie case of discrimination under *Griggs*, *Albemarle* and *Teal*. Their position loses sight of the fact that the Supreme Court in *Teal* and the court of appeals for this circuit in *United States v. City of Chicago*, 663 F. 2d 1354, 1357 n. 8 have approved the Uniform 80% guideline. Furthermore, a 4/5 disparity, which is what the 80% rule tolerates, is itself a significant disparate impact. The line is a generous one which should not be watered down by lax judicial application.

Defendants argue that a conclusion that plaintiffs have proved a prima facie case on the basis of the foregoing statistics is contrary to our conclusion in *United States v. City of Chicago*, 411 F. Supp. 218, 239 (1976) that the 1970 lieutenants' examination and performance ratings were not impermissibly discriminatory. At the time of our 1976 decision, the Uniform 80% rule had not been promul-

gated and, accordingly, it had not been approved by the Supreme Court and the court of appeals. Furthermore, the proof here is of greater precision and persuasion that was presented with respect to the 1970 examination. We hold that plaintiffs have proved a prima facie case in the present proceeding.

Indeed, defendants recognized as much when, more than a year prior to trial, they did not deny plaintiffs' Rule 36 request that "examination number 7081 [the lieutenants' examination] . . . had a disparate impact upon black applicants." By their failure to deny that request, defendants admitted it. That was a judicial admission by the defendants that the examination had a disparate impact upon black applicants. We question their ability to contradict it now. *Rainbolt v. Johnson*, 669 F. 2d 767, 768 (D.C. Cir. 1981). "A judicial admission, deliberately drafted by counsel for the express purpose of limiting the facts and issues, is traditionally regarded as conclusive, and an admission under Rule 36 falls into this category." 8 C. Wright & A. Miller, Federal Practice and Procedure, §2264, p. 743 (footnote omitted). "Any evidence inconsistent with the stipulated admissions cannot be considered by the court." *Shakman v. Democratic Organization of Cook County*, 481 F. Supp. 1315, 1346 n. 35 (N.D. Ill. 1979).

Apart from the Rule 36 admission, however, plaintiffs have established a prima facie case placing upon defendants the burden of demonstrating that "any given requirement [has] a manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432. The test must be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Albemarle*, 422 U.S. at 431. At trial, defendants sought to meet this burden with proof of content validity.

When a claim of content validity is made, the employer must show that the tasks on the examination substantially

represent equivalent tasks on the job. *United States v. City of Chicago*, 549 F. 2d 415, 434 (7th Cir. 1977). Such a showing must be preceded by a thorough task analysis of the job to be performed. *United States v. City of Chicago*, 573 F. 2d 416, 425 (7th Cir. 1978) (Fire Department litigation). The evidence shows substantial flaws in defendants' "task analysis". In addition, the examination fails to measure relevant job functions.

According to defendants' evidence, the job analysis included 30 to 40 interviews with field lieutenants, during which a questionnaire was completed. Thereafter another questionnaire was administered to 20 lieutenants. Those given the first questionnaire were limited to field lieutenants even though lieutenants are engaged in staff and non-field work. Furthermore, the persons who filled out the questionnaire were the "best men" available, resulting in a non-representative sample.

The second defect in the job analysis was defendants' failure to retain any source data. "It is essential that the sample design, the questionnaires and the manner of interviewing meet the standards of objective surveying and statistical techniques." *Pittsburgh Press Club v. United States*, 579 F. 2d 751, 758 (3d Cir. 1978). Incredibly, defendants in the throes of the 1976 employment/promotion litigation, did not retain any of the completed questionnaires and did not even have a copy of the questionnaire that was actually administered. Nor did defendants maintain records showing the identity of the persons who filled out the questionnaire. Thus, there is no beginning "record of validation" *United States v. City of Chicago*, 549 F. 2d 415, 432 (7th Cir. 1977).

After the job analysis had been completed, defendants' next step was to determine how the dimensions of the job of lieutenant should be measured. Initially, they planned a written test of job knowledge as a screening device to be followed by an "assessment center".

The assessment center approach was abandoned as too expensive, although no estimate of the costs involved in

using that technique was ever prepared. Defendants' outside expert, Alvares, had concluded that all dimensions of the job could not be measured by a written test. Therefore, oral interviews were used in an attempt to measure dimensions which were not covered in the written exam. Alvares conceded, however, that there is no data which shows that the oral scores actually measured these dimensions or indeed measured anything other than "halo."

The final component of the exam—performance ratings—was used without any data to show that the ratings measured actual performance. Defendants were explicitly warned by Alvares that "the justification for the performance evaluation is weak." (Plaintiffs' exhibit 15). He also advised against using any performance rating given after the announcement of the exam, but that advice was ignored.

The written test consists of 84 multiple choice questions. Information from department "general orders" was used as the source of the questions. The evidence is in total disarray as to how and by whom the general orders were selected. A panel of high ranking "experts" was recruited, but they were not provided with copies of the orders. They were given a check list keyed to the general orders. But the checklists could not be found and they have never been produced. Thus the basic source of the written examination is a mystery.

Equally unanswered is the question, Who wrote the actual test? According to Alvares, all of the questions used on the written exam were written by non-police graduate students at Bowling Green University where Alvares is a professor. According to defendants' witness Joyce, some of the questions were prepared by staff members of the Department of Personnel. Yet another version was offered by Deputy Chief of Patrol Charles Pepp who testified that he along with other high ranking officials prepared questions for the written test.

It is equally unclear who reviewed the multiple choice questions before they were incorporated in the written

examinations. When Joyce was deposed in 1981, he identified Sam Nolan, Fred Rice, Thomas Lyons, James Riordan, and Patrick Needham, as the high ranking police officers who reviewed the written test questions. But Nolan, Rice and Lyons each denied having reviewed the written exam. At trial, Joyce explained the contradiction by his "faulty" memory. He then stated that Nolan (contrary to Nolan's testimony), Needham, Spiotto and Killackey were the reviewers.

Documentary evidence produced by defendants indicates that 122 questions were prepared at Bowling Green and reviewed by Needham, and Spiotto. Their efforts were, according to Joyce, incorporated into a loose-leaf notebook which was marked defendants' exhibit 5. When Needham testified, he stated that he was not familiar with the notebook.

The effectiveness of the screeing process by Needham and Spiotto was dubious. Of the 84 questions used on the exam, Needham and Spiotto were unable to answer correctly 17. In his deposition (admissible as the admission of defendant City), Needham described some of the questions as "silly stuff" and stated that "most of these questions I would have pitched if I had seen them." The test was "not what we would have liked by any stretch of the imagination."

In preparation for trial, *plaintiffs* asked Needham and four other high ranking police officials to review the 84 test questions actually used. They could agree that only 11 of the 84 questions were very important for a lieutenant to know. Thus, as in *Firefighters' Institute v. City of St. Louis*, 616 F. 2d 350 (8th Cir. 1980), it appears that "the examination measured items of knowledge that were not necessary for successful performance of [the] job."

An important part of test validation is the "retranslation" of test items to job dimensions. Alvares and Joyce undertook this task. Their differences are so extreme as to border on the ludicrous. Alvares found 42 questions related to dimension number 11 while Joyce found none;

Joyce found 39 items related to dimension number 3 and Alvares found 19. The only inference that can be drawn from the retranslation is that guess and conjecture were the only links between the items and the dimensions to be tested.

The evidence presented at trial demonstrates that higher scores do not necessarily demonstrate greater knowledge of significant policies and procedures of the Department. Virtually the entire difference in individual final scores on the written test is attributable to only 48 of the 84 questions. They are "significantly correlated" with the final score. The disparate impact of the written test arises solely from the "significant" questions. Accordingly, defendants must establish that the validity of the test is enhanced by these questions. The evidence was to the contrary.

As previously noted, plaintiffs requested Needham and four other high ranking police officers to review the questions on the exam. These experts concluded that at least 24 of the 48 significant questions failed to measure important aspects of the job of lieutenant in a reliable manner.

In his review of the results of the lieutenants' examination—a review which he undertook while employed by the City in its Department of Personnel—Joseph Schreiner concluded that the written score "may not truly represent any meaningful construct." The evidence presented at trial is in accord with Shreiner's finding: there is no basis to conclude that the scores on the written test had "a manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432.

The oral interviews were used in an attempt to measure dimensions of the lieutenants job which were not translated in the written test. Defendants' expert Alvares conceded, however, that there is no data to show that the dimensions were actually measured by the oral interviews.

Furthermore, the performance of the raters was doubtful. As stated in one of defendants' internal reports (plaintiffs' exhibit 60):

> The quality of the rater's judgment is suspect because individual raters have extremely consistent and reliable assessments of a candidate's ability, but the assessment between raters agree poorly. It would require nine raters to attain internal consistency reliability of .90, given this poor agreement. Though there were ten separate scales on the orals, they effectively measure only one global ability assessment.

The raters were instructed to ask verbatim the questions which had been written at Bowling Green. As Alvares testified, the more unstructured an interview, the less valid its results. A training session was held to insure that the raters followed these instructions. But not all of the raters attended the training session. In addition, the evidence shows that the instructions were not followed by all of the raters. The evidence is that the interviews concerned matters other than the questions and were shorter than the time allotted in the instructions.

Once again, crucial documents relating to the oral boards were not retained by defendants. Over Alvares' objection, background information about applicants was provided to the raters at each oral interview. Alvares never saw the form used to provide this information and defendants failed to produce any of the forms during discovery or trial. Although raters were not to have known the results on the written examination, one candidate testified that his written scores were discussed by the panel at his oral interview.

Finally, as previously noted, documents which were provided by the defendants demonstrated that four of the raters at the oral boards gave consistently lower scores to blacks than whites. Plaintiffs have demonstrated that the disparate impact of the oral scores was attributable to these four raters.

In his October 12, 1978 memorandum (plaintiffs' exhibit 15), Alvares suggested that the race differences on the oral scores "best . . . remain undiscussed." Defendants failed to adjust for the race differences. Their failure destroys any claim of validity for the oral scores.

In the earlier litigation concerning the promotion of sergeants, we expressed some concern about performance ratings in promotional decisions. Initially, we enjoined their use. In the final decision, we vacated that injunction. In that litigation, we concluded, in the absence of the Uniform 80% rule, that the performance ratings used for the promotion of sergeants were not discriminatory. Here we have concluded, using the 80% rule, that plaintiffs have established a prima facie case that the performance ratings do have a discriminatory disparate impact upon black lieutenant applicants. That being the case, the burden rests upon defendants to validate the performance ratings. They have failed to do so.

Defendants' consultant Alvares pointed out that "the justification for the performance evaluation is weak." (Plaintiffs' exhibit 15.) He also testified that there is no data to show that the performance ratings actually measure performance.

The evidence shows that the fourth rating was given following the announcement of the lieutenants' promotion exam so that the rater knew the potential effect of the rating.

The ratings are subject to forced averaging at 85 (on a scale of 100). Performance ratings are frequently decided upon at a staff meeting. A global assessment is given to a sergeant and subscale ratings are then calculated to average the final rating.

However, certain high cluster units are exempt from the forced average. Here all can receive excellent marks. Former Superintendent Brzeczek conceded that performance ratings are influenced by job assignments.

In most units, the average performance score is 87.8, but in the high cluster units, the average score is over 92.4. The higher scores in the high cluster units have a great impact upon the final rank on the lieutenants' test. The 4.6 point increase in performance ratings would be reflected in a 1.38 point increase in the final score which would move a person from 108 to number 57 on the list.

Blacks in high cluster units are not rated in the same way as are whites. Although 36 of the highest scoring 150 sergeants came from the high cluster units, only one of these 36 is a black. High cluster assignments are not posted; they are learned about and applied for by word of mouth.

Defendants have failed to establish that the performance rating system is related to performance as a sergeant.

The relative weight given to each of the segments of a multi-segment exam such as this, is of great importance in assessing a claim of content validity. The draft of defendants' final validation study acknowledges that the relative weights were "arbitrarily assigned." (Plaintiffs' exhibit 16 at 5.) The evidence at trial showed that the 40-30-30 weight is without emperical basis and is "only so much window dressing." (Plaintiffs' exhibit 60 at 2.)

As explained by Joseph Schreiner in a memorandum he authored while employed by the City in its Department of Personnel:

> . . . the relative ratios between the standard deviations of the 3 test components is indicative of the relative importance of the 3 components to the total score. The average component score has *no* effect on the final ranking; only the component standard deviation does. The multiplier weight has no effect on the true importance of a component to the total score, except to the extent it modifies the component's standard deviation. Thus, the .4 - .3 - .3 weighting is only so much window dressing, for it is not indicative of the true importance of each of the components to the final score.
>
> * * *
>
> All other things being equal, it will be best for a candidate's final score if he did well on the written, rather than the orals, or the efficiencies, for the scoring procedure allows this higher standing to be translated into more points. In terms of influencing the final score, the relative importance of the three is

not 4-3-3. It is 6-3-2. (emphasis in original) (Plaintiffs' exhibit 60 at 2-3.)

More than three-quarters of the variance in final scores is attributed to the written score alone. Forty-eight of the 84 questions on the written exam explain 95% of the variance in written scores. Half of those 48 questions were poorly written or not job related by the five departmental experts recruited by plaintiffs. There can be little doubt of the lack of job relatedness in the final score. It was for this reason that Alvares recommended "that the less said [about how the scores are combined at the end of the process] the better." (Plaintiffs' exhibit 15).

Defendant's expert Alvares acknowledged that there was a lack of any emperical basis for the combination of scores. This coupled with the extreme influence which the written scores had on final rankings demonstrates that the combination of three scores on tests which were not job related did not produce a job related final score.

The final list of eligibles shows that 41 applicants (ranging in final rank from 89 to 130) received scores between 88 and 89. Rank order promotion could result in an applicant with a score of 88.53 being selected over an applicant with a score of 88.49. This difference in scores in infinitesimal. It is less than one question on the written test. It could be the result of a lucky guess or a one point difference in a single performance rating. As the defendant Pounian conceded, there is no way to tell that a person with a score of 88.53 would be a better lieutenant than one with a score of 88.49.

But the vice here is not so superficial as 108 vs. 109. Defendants concede that they could not justify a decision based upon such miniscule differences in final scores. But they are also unable to justify the promotion of the top 108 of the list over the next 108. As their consultant Alvares testified, there is no data to show that the first 108 on the list will be better lieutenants than the next 108. Nor, of course, is there any data from which one could say whether number 216 would be better or not as good as number 1.

The Uniform Guidelines require that an employer show "that a higher score . . . is likely to result in better job performance" in order for scores to be used in rank order. Uniform Guidelines, §14(C)(9). We have previously adopted this standard when we held that in order to establish validity the defendants must demonstrate that scores are "a valid predictor of performance on the job." *United States v. City of Chicago*, 385 F. Supp. 543, 559 (N.D. Ill. 1974). Such evidence is lacking here.

Rank ordering satisfies a felt need for objectivity, but it does not necessarily select better job performers. In some circumstances, the virtues of objectivity may justify the inherent artificiality of the substantively deficient distinctions being made. But when test scores have a disparate racial impact, an employer violates Title VII if he uses them in ways that lack significant relationship to job performances. *Guardians Association of New York City v. Civil Service Commission*, 630 F. 2d 79, 100 (2nd Cir. 1980).

Emperical evidence is necessary to validate rank order selection from a test which has a disparate racial impact. *Firefighters Institute v. City of St. Louis*, 616 F. 2d 350, 358 (8th Cir. 1980). The complete absence of any evidence to justify rank order promotion requires that the practice be disapproved.

Although we have found defendants' 1977 lieutenants examination invalid under Title VII, it does not follow that it was arbitrary and capricious so as to entitle the intervenors, Maurice Thoele, et al. to recover under the Due Process Clause of the fourteenth amendment. While they may be the beneficiaries of the Bigby plaintiffs' victory, they are not entitled to any relief in their own right.

All members of the Bigby class have been denied equal employment opportunities contrary to Title VII of the Civil Rights Act of 1964, as amended. The basic remedy for this discrimination is an equalization of promotions. There is presently pending a motion by defendants to promote 40 persons to the rank of lieutenant from the 1970

list. The first 11 should be members of the Bigby class in their rank order on the eligibility roster. Thereafter, the promotions should be made in accordance with the ratios of the applicant pool: 78.63% white, 17.7% black, and 3.58% hispanic.

The immediate promotion of 11 class members is necessary to undo the disparate impact of promotions already made. Only 11 of the 108 persons promoted—10.18%—have been black. The immediate promotions of 11 class members will bring the black proportion to 18.18% which is in line with the 17.7% black composition of the applicant pool.

Another important element of the remedy provided by Title VII is back pay. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). Because it is impossible to determine which class members would have been promoted if defendants that employed a job related test, class back pay is appropriate. *Stewart v. General Motors*, 542 F. 2d 445, 452 (7th Cir. 1977). The amount of back pay to be distributed to the class is based upon the loss to the class as a result of the discriminatory selection process. *Hameed v. International Association*, 637 F. 2d 506, 520 (8th Cir. 1980). Plaintiff urges that each class member should receive an aliquot share of the class back pay pool.

Defendants, concentrating on liability, have not responded to plaintiffs' proposed back pay formula. They should promptly do so in order that the back pay may be embraced in the final decree, which we direct plaintiffs to present.

One additional remedy is called for in light of the record in this case: monitoring. The facts surrounding the preparation, documentation and analysis of the lieutenants' examination make plain that careful monitoring of future test development is essential. The need for monitoring is made evident by the circumstances surrounding the defendants' production and failure to produce crucial documents during the course of discovery and trial.

Defendants' witness Joyce testified that he had located a set of general orders which had been used in the preparation of the exam, and that he had delivered the documents to defendants' counsel. The documents were not produced prior to trial nor were they referred to in defendants' response to plaintiff's rule 34 request. Following Joyce's testimony, we directed an inquiry to counsel who responded that, "everything that I had I turned over, as far as I know, and I do not have any such set of general orders in my file." (Tr. 500.) We then made plain that a set of general orders were crucial to defendants' case. Magically, the general orders were produced the following day! Later, Joyce testified that the documents had just been discovered "sometime last week." (Tr. 1158.)

Defendants' failure timely to produce documents is compounded by their policy of non-retention of crucial documents: the forms rating the importance of general orders, questionnaires used in the job analysis, rosters of who participated in the surveys, the summary of background information used at oral interviews, and finally, the Alvares memo in which he expressed his doubts about the validity of the examination. (Plaintiff's exhibit 15.) Although addressed to defendant Pounian and then his colleagues Joan Cole and Joyce, none could recall receiving it. The contents of the memo were noteworthy. Alvares called defendants' attention to the lack of support for the use of performance ratings, the problems involved in the arbitrary combination of the written, oral and performance scores, and the existence of raters who favored whites over minorities. Prior experiences in this litigation leave us with nagging doubts as to the professed ignorance of the memo.

Certain it is that the Alvares memorandum was revised to "cover everything in as positive a light as possible." (Plaintiffs' exhibit 15.) Thus, the language in the draft—that the adequacy of content validation "is still a matter of emperical speculation" was removed from the final report. In addition, Alvares' characterization of the 40-30-30 weights as "arbitrary" was excised because it was "too

strong." (Tr. 150.) Also omitted was Alvares' statement that "it was impossible to distinguish between the relative importance" or the orals and performance ratings. Defendant Pounian claimed not to know why this phrase was crossed out. (*Id.* 155). Finally, while the draft recognized the "artificial 'game-playing' that frequently happens when individuals try to raise their evaluations immediately prior to the exam," (Plaintiffs' exhibit 15 at 8), this criticism is nowhere contained in the final report.

It was the revised final report which defendants produced for plaintiffs' inspection. The original draft would never have come to light had it not been that Alvares was called upon to produce documents by way of subpoena.

Somewhat akin to the "non-retention policy" is defendants' failure to documents important activities in the preparation of the examination. Much of the work supposedly done in preparing the test can only be reconstructed from the testimony of a witness who acknowledged that his memory is "faulty." (Tr. 1151.) The identity of many of those who participated in the preparation of the exam is a total mystery and there is conflict among the testimony of high ranking officers with regard to their participation. We are utterly at a loss to comprehend how defendants, having been found to have violated Title VII just five months before they commenced the preparation of this examination, could be so neglectful in their record-keeping with respect to this examination.

Finally, the evidence shows that defendants have nade little or no use of their sophisticated computer capacity. Important analyses that could have been performed were not performed. And those that were undertaken were either ignored or undertaken solely to defend this case. No adequate computer analysis was made of the performance ratings. Nor was any evaluation of the disparate impact of each component of the examination undertaken. Defendants virtually ignored the complex analysis undertaken by Alvares of the oral scores in his findings that some raters gave significantly lower scores to blacks.

The evidence in the case requires monitoring to ensure "that a fair test can be created without substantial further delay." *Castro v. Beecher*, 459 F. 2d 715, 738 (1st Cir. 1972). We reserve at this time articulating the precise dimensions of the monitoring relief. One form worthy of consideration by the parties is that invoked in *Firefighters Institute v. City of St. Louis*, 616 F. 2d 350, 368 (8th Cir. 1980). The parties must work together to develop a valid examination. Defendants should disclose to plaintiffs' counsel and experts, under an appropriate protective order, all steps involved in the test development. Plaintiffs' counsel and their experts should be invited to all planning meetings, and should receive copies of all reports and memoranda generated in the preparation of the examination. Plaintiffs' counsel should be permitted to advance constructive criticisms. To ensure that defendants do not again embark on a course calculated to be indefensible under Title VII, we should retain jurisdiction over future test developments.

Defendants' pending petition to modify the injunction prohibiting promotions to the rank of lieutenant of police and for permission to promote 40 sergeants to the rank of lieutenant in rank order from the existing roster is denied. Plaintiffs' counsel is directed to present a decree in conformity with the views expressed herein with notice to defendants.

ENTER:

/s/ Prentice H. Marshall
District Judge

DATED: April 18, 1984.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,
Honorable PRENTICE H. MARSHALL

Cause No. 80 C 5246 Date April 18, 1984

Title of Cause WILLIAM C. BIGBY, et al. and MAURICE THOELE, et al. v. CITY OF CHICAGO, et al.

ORDER

Defendants' pending petition to modify the injunction prohibiting promotions to the rank of lieutenant of police and for permission to promote 40 sergeants to the rank of lieutenant in rank order from the existing roster is denied. Plaintiffs' counsel is directed to present a decree in conformity with the views expressed in the attached opinion with notice to defendants. (DRAFT)

/s/ PRENTICE H. MARSHALL

Domenic DiIULIO, et al.,
Plaintiffs-Appellants,

v.

BOARD OF FIRE AND POLICE COMMISSIONERS OF the CITY OF NORTHLAKE, et al., Defendants-Appellees.

No. 80-1966.

United States Court of Appeals,
Seventh Circuit.

Submitted April 6, 1982

Decided June 30, 1982.

Before CUMMINGS, Chief Judge, PELL, Circuit Judge, and CUDAHY, Circuit Judge.

PELL, Circuit Judge.

At issue in this case is the constitutional validity of an examination required for the promotion of appellants, police patrolmen, to the position of police sergeant.[1]

I

In our appraisal of appellants' claims we must accept their version of the facts properly before the district court because that court granted summary judgment against them.[2] *Bishop v. Wood*, 426 U.S. 341, 345, 347, 96 S.Ct. 2074, 2077, 2078, 48 L.Ed.2d 684 (1976).

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[1] The action was brought pursuant to 42 U.S.C. § 1983 and the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. Damages, as well as declaratory and injunctive relief, are being sought.

[2] In granting summary judgment for appellees the district court was required to resolve all genuine disputes as to material facts in favor of appellants. *Fed.R.Civ.P.* 56(c).

Appellants were hired prior to December 10, 1977, as police patrolmen by the Board of Fire and Police Commissioners of the City of Northlake, Illinois. Promotion within the Northlake Police Department is governed by state law and the Rules and Regulations of the Board of Fire and Police Commissioners of the City of Northlake (the Board), *Ill.Rev.Stat.* ch. 24, § 10-2.1-1 *et seq.*, pursuant to which, promotions are based upon merit, seniority, and competitive examinations. In all cases where it is practicable, vacancies are to be filled by promotion. A promotion roster must be prepared based on the competitive examinations, ascertained merit, and seniority. Vacancies must be filled by one of the three candidates at the top of the roster, and a high ranking candicate cannot be passed over more than twice.

"[I]n determining next in order of rank in promotional examinations, . . . [the Board] extend[s] the examination successively through all the orders of rank in the services in an endeavor to qualify suitable eligible or eligibles for the vacancy or vacancies existing before extending the examination to the general public." And "[n]o examination shall be given if a vacancy exists at that time and an eligibility list is in existence." The names of candidates on the promotional roster may be removed by the Board after two years only if all existing vacancies are filled prior to cancellation. *Ill.Rev.Stat.* ch. 24, § 10-1-13.

The competitive written promotional exam accounts for 55% of the total score in the promotional scheme.[3] A score of 70 is required to pass the written exam. It is statutorily provided that the examination shall be conducted by the Board and that the "examinations shall be practical in character and relate to the matters which will fairly test the capacity of the persons examined to discharge the duties of the positions to which they seek [promotion]." *Ill.Rev.Stat.* ch. 24, 10-2.1-6.

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[3] The other factors in the promotional scheme are ascertained merit and seniority in service.

On December 10, 1977, the Board held a promotional examination for the rank of sergeant.[4] The plaintiffs, seeking promotion to the rank, unsuccessfully participated in said examination.[5]

Appellants' cause of action is based on their claim that the promotional examination was "arbitrary, capricious, and discriminatory and lacked and was devoid and not in furtherance of any substantial, rational, reasonable an [sic] or compelling, relationship to any legitimate promotional scheme for the rank of sergeant, purpose or objective, in violation and derogation of due process of law and the equal protection of the laws guaranteed under the Fourteenth Amendment . . . because it was not validated nor job related."[6] This case is not moot as we cannot state with assurance that there is no reasonable expectation that the alleged violation will recur, nor have interim relief or events completely and irrevocably eradicated the effects of the alleged violation. *County of L. A. v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979).

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[4] The Board stated that since 1970 it has used independent testing agencies to develop and conduct the written promotion examinations.

[5] Three plaintiffs did not achieve the minimum score necessary for placement on the promotion roster. Our plaintiff passed the examination and was ranked seventh on the promotion roster.

[6] Appellants cite specific questions contained in the promotional exam which they argue are representative of the examination's alleged lack of job relatedness or validity: "a. Would you drink blood if you had to? b. Do you believe God has talked to you personally? c. When you wake up in the morning, is your heart beating? . . . The above questions represent approximately 450 similar questions that had to be answered either as never, most never, probably not, probably, most probably, more likely . . . none of the questions related to police work . . . . [Some of the other cited questions def[y] a correct answer without requiring the examinee to explain his answer. . . . [Other cited] questions required a self-evaluation by the examinee which evaluation was self-opinionated and would have no bearing on his performance as a police officer. . . . [And] the last section of the written examination was not validated or job related in that it required knowledge of crimes that police officers do not ordinarily encounter [examples cited]."

II

To satisfy the prerequisite for an assertion of the constitutional requirements of due process, a party must implicate a protected interest in either life, liberty, or property. *Board of Regents v. Roth*, 408 U.S. 564, 569, 570, 571, 92 S.Ct. 2701, 2705, 2706, 33 L.Ed.2d 548 (1972). The district court disposed of appellants' due process claim by concluding that since state law does not grant appellants "a proprietary interest in a validated or otherwise certified job-related promotional examination, it is clear that no constitutionally protected interests are involved in the present matter." We believe that the district court's sole focus on a property interest without regard to a liberty interest was in error. Appellants' promotion was not a matter subject to the Board's grace, nor was it a matter left to the unfettered discretion of the Board. *Compare, Board of Regents v. Roth*, 408 U.S. at 567, 92 S.Ct. at 2704. As we explained in Part I, the promotion scheme was based on evaluation of merit, seniority, and competitive examination. While the state can require high standards of qualifications, these standards must have a rational connection with the applicant's fitness or capacity to be a police sergeant. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). Attaching unreasonable and arbitrary requirements is violative of constitutional due process. *Smith v. Texas*, 233 U.S. 630, 639, 34 S.Ct. 681, 683, 58 L.Ed. 1129 (1914); *Smith v. Alabama*, 124 U.S. 465, 480, 8 S.Ct. 564, 570, 31 L.Ed. 508 (1888); *State v. Walker*, 48 Wash. 8, 92 P. 775 (1907).[7] In the instant case, at issue is not the state's right to require an examination, but the rational relation between the particular questions formulating the exami-

[7] Of course the Fourteenth Amendment applies only to government actions. It is conceded here that appellees have acted pursuant to authority conferred by state law. *See* Part I, *supra*. The limitation against arbitrary action restricts the power of a state "no matter by what organ it acts." *Missouri v. Dockery*, 191 U.S. 165, 24 S.Ct. 53, 48 L.Ed. 133 (1903).

nation and the functions of the job of police sergeant. We hold that appellants have sufficiently implicated a liberty interest in promotion which cannot be denied without constitutional due process.[8]

While the state may test a person for the job, it may not test a person in the abstract. Constitutional due process guarantees that no person will be arbitrarily deprived by the government of his liberty to engage in any occupation. "[T]he liberty guaranteed by the Fourteenth Amendment . . . without doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual . . . to engage in any of the common occupations of life . . . ." *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), *cited* in *Board of Regents v. Roth*, 408 U.S. at 572, 92 S.Ct. at 2706; *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102, 96 S.Ct. 1895, 1904, 48 L.Ed.2d 495 (1976); *Traux v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915). In *Graves v. Minnesota*, 272 U.S. 425, 47 S.Ct. 122, 71 L.Ed. 331 (1926), the Supreme Court upheld the constitutionality of a state statute prohibiting the practice of denistry without a diploma from a dental college of good standing, as against the contention that the requirement violated constitutional due process. The Court did not uphold the requirement of a diploma *per se*, but rather the rationale for requiring a particular type of diploma in that case. As the Court stated, "clearly the fact that an applicant for a license holds a diploma from a reputable dental college has a *direct and substantial relation to his qualification to practice dentistry.*" *Id.* at 428, 47 S.Ct. at 123 (emphasis added).

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[8] "If [a state] purported to confer arbitrary discretion to withhold a license, or to impose conditions which have no relation to the applicant's qualifications to practice [a profession], the statute would, of course, violate the due process clause of the Fourteenth Amendment." *Douglas v. Noble*, 261 U.S. 165 at 168, 43 S.Ct. 303 at 304, 67 L.Ed. 590.

Similarly, at issue in the instant case is whether the particular promotion examination has a direct and substantial relation to appellants' qualifications to be police sergeants.[9] In *Konigsberg v. State Bar of California*, 366 U.S. 36, 81, S.Ct. 997, 6 L.Ed.2d 105 (1961), (*Konigsberg II*) the Supreme Court upheld the state's refusal to license an applicant to the bar because of his refusal to answer questions. Again *Konigsberg II* did not sanction the asking of any questions regardless of their rational relation to the functions of the profession. What was critical in *Konigsberg II* was that the particular questions at issue were found to be substantially relevant to the applicant's qualification and thus in accordance with due process guarantees. Appellants' assertion in the instant case is analogous to the assertion of an applicant for admission to the State Bar whose prior membership in the Communist party and his use of aliases were not rationally related to the qualifications required for membership in the legal profession as to serve as a rational basis for the state to deny him permission to take the bar exam. *Schware v. Board of Bar Examiners, supra.* In *Schware* the Supreme Court held that plaintiff had sufficiently asserted a liberty interest to employment guaranteed by the due process clause.[10]

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[9] "[I]t does a man little good to stay alive and free and propertied, if he cannot work [in his chosen occupation]. The distinction between the state's power to license doctors and to license street vendors is one of degree. The fact that a doctor needs a good knowledge of biology is no excuse for suspending his license because he has little or no knowledge of constitutional law." *Barsky v. Board of Regents*, 347 U.S. 442, 473-74, 74 S.Ct. 650, 666-67, 98 L.Ed. 829 (1954) (Douglas, J. *dissenting*).

[10] Appellants' claim is not precluded by the fact that they cannot be certain that they would have achieved a sufficient score so that they would have been promoted had they been given a job-related examination. in *Schware*, the plaintiff could not be certain that he would have in fact passed the bar examination; nevertheless he was allowed to challenge, on due process grounds, the state's denial to him, based on a finding of unfitness to practice law, of permission to take the examination.

(Footnote continued on following page)

III

Normally in a case such as this, where only constitutional due process interests are sufficiently asserted, a plaintiff has the burden of moving forward and the ultimate burden of proving that the state-established requirements for the employment he sought are not rationally related to the functions of the job.[11] The state is not

[10] *continued*

The district court concluded that plaintiffs have no proprietary interest in a job-related promotion exam. However, because we hold that plaintiffs asserted a due process claim based on a liberty interest, and because the due process requirements of a rational relationship between the examination and the job functions of a sergeant are the same in this case, whether plaintiff is recognized to have a liberty or proprietary interest, it is unnecessary for us to determine if plaintiffs have a proprietary interest recognized under state law.

[11] Also compare the burden of proof in a case involving the constitutional standard for adjudicating claims of invidious racial discrimination, on the one hand, and Title VII discriminatory impact claims on the other hand: Under Title VII plaintiff establishes a prima facie case of racial discrimination by merely showing "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975). The burden then shifts to the defendant to show that the testing system has been validated for job relatedness through proof "by professionally acceptable method" that the testing system is " 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' " *Id.* at 431, 95 S.Ct. at 2378. The Title VII plaintiff may then attempt to show that the defendant's test validation was merely a pretext by proving "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.' " *Id.* at 425, 95 S.Ct. at 2375 (citation omitted).

On the other hand, "racial discrimination within the meaning of the equal protection clause could not be demonstrated solely by a racially disproportionate impact. Rather . . . for constitutional purposes it is necessary to show an intent or purpose to dis-

(Footnote continued on following page)

constitutionally mandated to establish an examination as a requirement for promotion. Constitutional due process requires only that whatever requirements are established by the government must have a rational relation to the job's performance. Once the plaintiff puts into question the rationality of the requirements, the defendants may, but they are not constitutionally required to, articulate the rationality of the requirements by relying on the results of a professional validation study. There is no one method which is required for appropriately evaluating the relationship of an employment requirement to job performance.[12] *Washington v. Davis*, 426 U.S. at 247, 96 S.Ct. at 2051.

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[11] *continued*
criminate by reason of race. Thus, the Court has differentiated between the standard necessary to prove a violation of Title VII and the standard required under the Constitution. Under Title VII, a disproportionate racial impact remains enough to establish a prima facie case while under the Constitution evidence of intention must be proved." *United States v. City of Chicago*, 549 F.2d 415, 435 (7th Cir. 1977), *citing*, *Washington v. Davis*, 426 U.S. 229, 238-39, 96 S.Ct. 2040, 2046-47, 48 L.Ed.2d 597 (1976).

[12] The inquiry as to the rational relationship of a promotion examination to job performance is not limited to equal protection claims based on adverse racial impact. The district court was incorrect to assume that the inquiry as to the validity of the promotion examination is limited to claims of adverse racial impact. The district court placed too heavy a reliance on EEOC "Guidelines" which provide that "use of a selection procedure is in compliance with these guidelines . . . *if such use does not result in adverse impact on any race, sex, or ethnic group.*" 29 CFR § 1807.16, *cited* at note 2 of district court's order (emphasis added by the district court). The EEOC guidelines focus on racial impact because they are the enforcing agency's administrative interpretation of Title VII, *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34, 91 S.Ct. 849, 854-55, 28 L.Ed.2d 158 (1971), and Title VII is specifically geared to employment discrimination practices. As we explained, a professional validation study is merely a statutory requirement under Title VII, but it is not a constitutional requirement. However, an examination allegedly lacking in a personal relationship to the functions of the job to which it is geared is not foreclosed from constitutional due process inquiry for having

(Footnote continued on following page)

The distinction elucidated between constitutional claims under the Fifth and Fourteenth Amendments and a Title VII claim, is crucial because, unlike under Title VII, the inquiry in the instant case, resting solely on alleged violation of constitutional due process, should not focus on the quality of a particular validation study, or on the availability of other employment selection procedures that would have a less discriminatory impact. *Id.* at 247-48, 96 S.Ct. at 2051. In the instant case, plaintiffs may not simply challenge the quality of the validation study without showing a lack of rational basis between the promotion requirements and a sergeant's job functions. In the due process context, there is no basis for courts to inquire as to whether or not a particular promotion method is most efficacious. And if defendants choose to articulate the rationale of the established procedures by depending on a validation study, it is not open to judicial inquiry whether a different validation study would have been superior. The judicial inquiry is over once a rational basis between the requirements and the job's functions is shown.

IV

While in the usual case the plaintiffs would have the burden of proving a lack of rational connection between the particular promotion examination and the functions of the job sought,[13] in the instant case defendants had the burden of proving that there was no genuine issue of material fact and that they were entitled to a judgment as a matter of law because defendants moved for a summary judgment. *Fed.R.Civ.P.* 56. The record dis-

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[12] *continued*
the distinguishing characteristic of being nondiscriminatory in its alleged irrationality. Whether the rights implicated are based on due process, equal protection, or Title VII, merely affects the burdens of proof.

[13] We agree with the district court that plaintiffs did not sufficiently assert a claim of denial of equal protection.

closes that the defendants articulated a rational relationship between the particular questions challenged in plaintiffs' complaint and the actual job functions of police sergeants.[14] In challenging the motion for summary judgment plaintiffs are not required to prove their contentions, but they are required to present enough specific facts as to raise a genuine issue as to the material issue of the rational relationship between the promotion examination questions and the job functions of police sergeants. *Choudhry v. Jenkins*, 559 F.2d 1085, 1089 (7th Cir. 1977). Thus it was up to the plaintiffs to raise an issue that the examination questions could not rationally guage an examinee's ability to perform the actual functions of police sergeants, or that the asserted functions were not in fact rationally related to a police sergeant's performance. Plaintiffs could not challenge the motion for summary judgment by relying on allegations contained in their complaint or on affidavits that merely stated conclusory allegations, as did the affidavit of the plaintiffs' counsel. *Fed.R.Civ. P.* 56. The only other affidavit submitted by plaintiffs was one from an individual who asserted that he is qualified in psychology and has expertise in analyzing promotional tests for policemen. We conclude that this affidavit did not raise genuine issue as to a fact material to the alleged constitutional violation. The affidavit merely raised an issue as to the quality of the professional validation study conducted to evaluate the promotion examination.

---

[14] The defendants' rationale from the record was that: the questions challenged by plaintiffs are job-related in that they were validated for determining intellectual ability, logical deduction, common sense, leadership, and decision-making ability, traits desired of sergeants since they are police supervisory personnel; the "criteria used in developing the test represented major or critical work behavior as revealed by careful job analysis. These critical work behavioral elements were developed by research teams, police chiefs, and division commanders. They were applied to existing sergeants and finally to patrolmen taking promotional examinations for the rank of sergeant. These behavioral elements were tested and retested prior to [the December 10, 1977] test."

But as we emphasized in Part III, defendants are not constitutionally required to conduct a professional validation study of the promotion examination. The facts articulated by the defendants directly addressed the sole material issue of constitutional magnitude in this case, namely the rational relation between the contents of the examination and the job performance of police sergeants. Plaintiffs' affidavits clearly do not raise a genuine issue as to this sole material issue.

V

For the foregoing reasons, the judgment of the district court is affirmed.

No. 85-574

Supreme Court, U.S.
FILED
DEC 2 1985
JOSEPH F. SPANIOL, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAURICE THOELE, LOUIS ARADO, HUGH HERATY, GARVIN NIX, JOSEPH LORENZ, MICHAEL GRIEGEL, WILLIAM McCORRY, DENNIS JYRKOWSKI, JOSEPH MUCIA, ROBERT MURRAY, JAMES ORR, RICHARD KIMBLE, JOHN KACHKA, ALEX McCRAE, FRANK SADLER, THOMAS MINASOLA, GEORGE HEAD, LEONARD MIJKA, JOHN VOLLAND, RONALD JABLON, RICHARD RICCIO, ARTHUR BISCHOFF, JAMES GEOGHEGAN, JOHN DUFFY, DANIEL McCRORY, WILLIAM DEVONEY, ROY WALKER, ALBERT POHL, ROBERT KEATING, RUSSELL ALONGI, KENNETH BRINGE, JOHN CULLOTON, JOHN TOLLEY, JOHN J. MURPHY, HUGH O'MALLEY, CARL NEUMULLER, JAMES BEGLEY, JAMES MORGAN, WILLIAM O'BRIEN, RAYMOND GREENWOOD, THOMAS CRONIN, THOMAS BRADY, TERRENCE McCUE, ROBERT TILL, FRANKLIN CRAWFORD, RAYMOND GIEHOOB, DANIEL MORAN, PATRICK LOGAN, TERRENCE FORBES, RALPH MORETH, JAMES P. BROWN, PAUL C. CEFFALIO and CHARLES R. LOFTUS, individually and on behalf of all others similarly situated,

Petitioners,

v.

CITY OF CHICAGO, CHICAGO POLICE DEPARTMENT, RICHARD J. BRZECZEK and CHARLES H. POUNIAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, sergeants in the Chicago police force, have a property or liberty interest in particular promotional procedures and in promotion to lieutenant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAURICE THOELE, et al.,

Petitioners,

vs.

CITY OF CHICAGO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, the City of Chicago, Chicago Police Department, Richard J. Brzeczek and Charles Pounian, by their attorney JAMES D. MONTGOMERY, Corporation Counsel of the City of Chicago, respectfully request that this Court deny the petition for writ of *certiorari*, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 766 F.2d 1053.

STATEMENT OF FACTS

A group of black police sergeants brought suit pursuant to Title VII against the City of Chicago, the Chicago Police Department and its Superintendent, and the Direc-

tor of the Chicago Department of Personnel. The plaintiffs had sought promotion to lieutenant. The suit charged that the City's promotional procedures were discriminatory, and, thus, plaintiffs were prevented from being promoted. The petitioners, a group of white and Hispanic police sergeants, intervened in the suit. The petitioners also had sought promotion to lieutenant and maintained that the promotional procedures violated their rights under the Due Process Clause of the Fourteenth Amendment. The district court found the promotional procedures contravened the provisions of Title VII but held "that it does not follow that it [the promotional scheme] was arbitrary and capricious so as to entitle the intervenors . . . to recover under the Due Process Clause of the Fourteenth Amendment" (C. 140, p. 20). The district court dismissed the intervenors' suit. The intervenors appealed.

The United States Court of Appeals for the Seventh Circuit upheld the order dismissing the intervenors' suit, holding that "a constitutional right, unrelated to racial or other discrimination, to a rational test for promotion to a higher rung in the civil service of a state or municipality" does not exist. *Bigby v. City of Chicago*, 766 F.2d 1053, 1056 (7th Cir. 1985). In so holding, the court of appeals expressly overruled its decision in *DiIulio v. Board of Fire & Police Comm'rs*, 682 F.2d 666 (7th Cir. 1982). In *DiIulio*, the court of appeals found that policemen in Illinois possessed a liberty interest in a promotional scheme that has a rational relationship to the job being sought. Petitioners contend that the court of appeals erred in affirming the order dismissing their claims and argue that: (1) the decision in *DiIulio* should not have been overturned; and (2) that petitioners have a property and a liberty interest in promotional procedures which have a rational relation to the job of police lieutenant.

REASONS FOR NOT GRANTING THE WRIT OF *CERTIORARI*

1.

Petitioners Do Not Possess A Constitutional Property Interest In Promotion To Police Lieutenant Or In Promotional Procedures Which Are Rationally Related To The Job Of Police Lieutenant.

The petitioners claim a property interest, which is subject to constitutional protection, in promotional procedures which are rationally related to the job of police lieutenant. The court of appeals stated that what petitioners truly seek is promotion to lieutenant. The petitioners possess neither a property interest in a particular promotional scheme nor in promotion to lieutenant.

The Fourteenth Amendment's procedural protections safeguard property, or "the security of interests a person has already acquired in specific benefits." *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972). A benefit, if it is to gain the status of a constitutionally protected property right, must have certain attributes. "To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. State law creates and defines the dimensions of property interests. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). Therefore, petitioners must have an entitlement to and not merely an abstract need for the type of promotional scheme they desire and for promotion to lieutenant.

Whether petitioners have a "legitimate claim of entitlement" to a promotion or to the promotional procedure they demand must be ascertained with reference to the

law of Illinois. The "touchstone" for such a determination has been described as follows:

> . . . the more circumscribed is the government's discretion . . . to withhold a benefit, the more likely that benefit constitutes "property" (cites omitted), for the more reasonable is reliance upon its continued availability and the more likely it is that a hearing will illuminate the appropriateness of withholding it in an individual case.

Beitzeill v. Jeffrey, 643 F.2d 870, 874 (1st Cir. 1981), *citing Roth, supra*; *Perry, supra*; and *Bishop v. Wood*, 426 U.S. 341 (1976).

Article 10, Division 1 of the Illinois Municipal Code, Ill. Rev. Stat., ch. 24, §10-1-1, *et seq.*, governs the terms and conditions of municipal public employment. Section 10-1-13 of the Illinois Municipal Code, Ill. Rev. Stat., ch. 24, §10-1-13, governs promotions in the Chicago Police Department and provides in pertinent part:

> The [civil service] commission shall, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination . . . . All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination.

The Illinois courts, considering this section and those sections of the Illinois Municipal Code governing the police forces of smaller municipalities, consistently have held that the manner of promotion is within the discretion of the government. *See, e.g., Lenert v. Wilson*, 56 Ill. App. 2d 325 (1st Dist. 1965); *McCoy v. Bd. of Fire & Police Comm'rs*, 79 Ill. App. 3d 742 (1st Dist. 1979); *Zuelke v. Bd. of Fire & Police Comm'rs*, 79 Ill. App. 3d 1080 (1st Dist. 1979); *Brunke v. Bd. of Fire & Police Comm'rs*, 99

Ill. App. 3d 25 (1st Dist. 1981). The courts also have held that the provision does not establish a vested right in promotion. *Lenert, supra*; *McCoy, supra*; *Sullivan v. Bd. of Fire & Police Comm'rs*, 103 Ill. App. 3d 167 (2nd Dist. 1981). The courts have rejected claims by applicants that particular types of promotional procedures are required. *See, e.g., Sullivan, supra* (where court noted that there was no authority for the proposition that a property interest exists in examinations of a particular character); *Burns v. Sheriff's Dept. Merit Com'n*, 86 Ill. App. 3d 226 (4th Dist. 1980) (where court held that "numerical scoring is not a necessary prerequisite for evaluating the fairness of a promotion process"); *Hauri v. Batzel*, 71 Ill. App. 3d 164 (2nd Dist. 1979) (where court rejected plaintiff's attempts to eliminate personal evaluations from police promotional scheme); *Zuelke, supra* (where court held that precise guidelines for assessing candidates efficiency and merit were not necessary).

Promotions to lieutenant are not governed by fixed standards which if met automatically entitle the petitioners to promotion. Under Illinois law, the petitioners do not have a vested property right in a particular type of promotional procedure or in promotion to police lieutenant, but "merely [have] standing to assert in an appropriate case" that the government has not followed the Illinois promotion statute. *Sullivan, supra*, 103 Ill. App. 3d at 172. Alleged violations of local statutes do not infringe the United States Constitution. *Snowden v. Hughes*, 321 U.S. 1 (1944).

The petitioners argue that the "ascertained merit" language of the promotion statute creates a property interest in promotion examinations that are rationally related to the job being sought. As shown, Illinois law bestows no

property rights in promotion or in specifically desired promotional procedures. Furthermore, the petitioner's argument defies the plain language of Section 10-1-13. This provision provides that promotions be based on three separate elements: "ascertained merit *and* seniority in service *and* examination." Ill. Rev. Stat., ch. 24, §10-1-13. These elements are "distinct". *Lenert, supra,* 56 Ill. App. 2d at 330. The only statutory language which defines the "examination" element is that language which provides that the examination should be "competitive".

Federal courts as well have determined that a property interest does not exist in government promotions. *Bara v. Aurora Civ. Serv. Com'n. of City of Aurora,* 580 F. Supp. 212 (N.D. Ill. 1983), *aff'd,* No. 85-1050 (slip opinion) (7th Cir. July 1, 1985), *cert. denied,* No. 85-575 (November 18, 1985) (where United States Court of Appeals for the Seventh circuit held that there exists no constitutionally protected interest in promotion and cited its opinion in this case); *Webster v. Redmond,* 599 F.2d 793 (7th Cir. 1979), *cert. denied,* 444 U.S. 1039 (1979); *Beitzell v. Jeffrey,* 643 F.2d 870 (1st Cir. 1981); *Burns v. Sullivan,* 619 F.2d 99 (1st Cir. 1980), *cert. denied,* 449 U.S. 893 (1980); *Robb v. City of Philadelphia,* 733 F.2d 286 (3rd Cir. 1984); *Clark v. Whiting,* 607 F.2d 634 (4th Cir. 1979); *Goodisman v. Lytle,* 724 F.2d 818 (9th Cir. 1984). *See, also, Doyle v. University of Alabama in Birmingham,* 680 F.2d 1323 (11th Cir. 1982) (where court held there was no property interest in a salary raise). A property interest was found not to exist even where the government had established criteria for promotion and where the promotion was to be made on the basis of merit or competitive examination. *Beitzell, supra; Goodisman, supra; Clark, supra; Webster, supra; Burns, supra.* In so holding,

the courts recognized that the promotion determination entails "subjective judgment, confidential deliberation, and personal knowledge" of the candidate. *Beitzell, supra,* 643 F.2d at 875.

The position of police lieutenant is one of considerable importance and public significance and involves a high degree of sensitivity and responsibility. The courts, therefore, afford the government great latitude of discretion in the selection and promotion to lieutenant. Petitioners, as candidates for promotion, do not have automatic rights or entitlements to promotion and possess no property interest in a particular promotional procedure. The court of appeals did not err by holding that Illinois law may create "an expectation that the examinations used for promotions in the civil service will be fair but . . . not so firm and definite an expectation as to be 'property' in a constitutional sense." *Bigby, supra,* 766 F.2d at 1056.

2.

Petitioners Do Not Have A Liberty Interest In Promotion To Police Lieutenant, And The Court Of Appeals Was Correct In Overruling *DiIulio v. Board of Fire & Police Comm'rs,* 682 F.2d 666 (7th Cir. 1982), Which Held Otherwise.

The petitioners claim a liberty interest "in a meaningful opportunity to advance" within the Police Department (Petition for Writ of Certiorari, p. 23). The Constitution does not recognize such a liberty interest. The court of appeals, in finding petitioners had no liberty interest in this case, reversed its prior decision in *DiIulio v. Board of Fire and Police Comm'rs,* 682 F.2d 666 (7th Cir. 1982). *DiIulio* had held that in Illinois, policemen possessed a liberty interest in a promotional scheme that has a rational relationship to the job being sought. This holding was con-

trary to established law and directly conflicted with a prior decision of the court of appeals in *Webster v. Redmond*, 599 F.2d 793 (7th Cir. 1979). It is respectfully submitted that the decision of the court of appeals reversing *DiIulio* and finding that no liberty interest exists in a promotion does not warrant further review or the exercise of this Court's supervisory power.

Not every government action affecting employment implicates a liberty interest. *Board of Regents v. Roth*, 408 U.S. 564 (1972). For,

> [t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made directly by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs (footnote omitted).

Bishop v. Wood, 426 U.S. 341, 349-350 (1976).

In order to state a claim for deprivation of a liberty interest without due process in a public employment case, it is necessary to allege that the public employer published, *Bishop v. Wood*, 426 U.S. 341, 348 (1975), stigmatizing information, *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972), about the employee that resulted in the deprivation of a recognized liberty interest without due process of law, *Paul v. Davis*, 424 U.S. 693, 701 (1976). "[T]o determine whether due process requirements apply in the first place, we must look . . . to the *nature* of the interest at stake." *Roth, supra*, 408 U.S. at 570-571 (emphasis in original). The liberty interests protected by due process include the right "to engage in any of the common occupations of life." *Myer v. Nebraska*, 262 U.S. 390, 399 (1923).

The liberty interest to pursue a chosen trade must be distinguished from an employee's wishes for a certain job. *Cafeteria and Restaurant Workers Union, Local 473*

AFL-CIO v. McElroy, 367 U.S. 886 (1961). A government employee might have a liberty interest where the government imposes "a stigma or other disability that foreclose[s] [the] freedom to take advantage of other employment opportunities." *Roth, supra*, 408 U.S. at 573. A deprivation of liberty may not occur even with the loss of a job, as long as one may obtain alternative employment. *Paul v. Davis*, 424 U.S. 693 (1976); *Roth, supra*.

The respondents' promotional procedures *may* have prevented petitioners from being promoted to lieutenant. The procedures, however, certainly did not prevent petitioners from engaging in the occupation of policeman. The petitioners are still in the employ of the city's police department and have not been discharged. The petitioners are free to remain in the position of sergeant, pursue police work, and are not foreclosed from seeking promotion to lieutenant in the future. The respondents, in declining to promote the petitioners, made no charges and gave no reasons. Only the fact of nonpromotion and the eligibility list in rank order of the candidates were made public.

The petitioners' liberty interests were not violated. The fact of nonpromotion at the most may affect the petitioners' employment desirability in the future, but does not foreclose in any way other employment opportunities or the continuation of petitioners' police careers. As the court of appeals held in *Webster, supra*, 500 F.2d at 798,

> [t]he mere fact of nonpromotion does not implicate a protectible liberty interest, *see Roth, supra*, and because neither the Board nor any of its members published reasons for the decision it cannot be said that the Board made "[a] charge against him that might seriously damage his standing and associations in his community." *Id.* 408 U.S. at 573, 92 S.Ct. at 2707 (footnote omitted).

Other federal courts have dismissed claims of a violation of a liberty interest based only on the failure to promote. *Robb v. City of Philadelphia*, 733 F.2d 286 (3rd Cir. 1984); *Bara v. Aurora Civ. Serv. Com'n of City of Aurora*, 580 F. Supp. 212 (N.D. Ill. 1983), *aff'd*, No. 85-1050 (slip opinion) (7th Cir. July 1, 1985), *cert. denied*, No. 85-575 (November 18, 1985); *Beitzell v. Jeffrey*, 643 F.2d 840 (1st Cir. 1981). These decisions follow the reasoning of this Court in *Roth, supra*, 408 U.S. at 573, 575, that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." It logically follows, that petitioners were not deprived of a liberty interest "simply" because they were not promoted when they are "free as before to seek" other employment opportunities, and more importantly, to continue in the occupation of policeman.

The court of appeals stated that "*DiIulio* stands alone" in finding a liberty interest in promotions. *Bigby, supra*, 766 F.2d at 1059. The court found that the error in *DiIulio* was that the decision did not "distinguish between exclusion from an entire occupation and exclusion from a particular position or rank in the occupation . . . ." *Id.* The distinction had to be made for the right to engage in an occupation must not be confused with the right to a particular job. *Lawson v. Sheriff of Tippecanoe County, Inc.*, 725 F.2d 1136, 1138 (7th Cir. 1984). In light of the settled law, the court of appeals did not commit error in reversing *DiIulio*, and a writ of *certiorari* should not be granted.

Petitioners assert not a right to engage in a given occupation, but rather a right to a particular job in the Chicago police force. These assertions do not establish a liberty interest owed protection by the Fourteenth Amendment.

CONCLUSION

For these reasons, the Petition for writ of *certiorari* should be denied.

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